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IN THE

Supreme Court of the United States

OCTOBER TERM 1972

No. 72-1562

LEON BURAS, JR., et al.,
Petitioners,

versus

UNITED STATES OF AMERICA,
CHEVRON OIL COMPANY, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

Supreme Court of the United States

October Term 1972

No.

LEON BURAS, JR., et al.,
Petitioners,

versus

UNITED STATES OF AMERICA,
CHEVRON OIL COMPANY, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this action on March 23, 1972, which reversed a judgment of the United States District Court for the Eastern District of Louisiana confirming Petitioners' title to certain lands in Louisiana and directing Respondent Chevron Oil Company to account for oil and gas wrongfully extracted.

CITATIONS TO OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Louisiana, 332 F.Supp. 1017, is printed as Appendix B. The opinion of the United States Court of Appeals for the Fifth Circuit reversing the judgment of the District Court, 458 F.2d 346, is printed as Appendix C. The order of the Court of Appeals denying Petitioners' petition for rehearing (including dissenting and specially concurring opinions), not yet reported, is printed as Appendix D. The orders of the Court of Appeals denying Petitioners' motion for leave to file a second petition for rehearing, not yet reported, are printed as Appendices E and F. The judgment of the District Court dated July 30, and entered July 31, 1970, is printed as Appendix G. The judgment of the Court of Appeals sought to be reviewed, dated and entered March 23, 1972, is printed as Appendix H.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on March 23, 1972. Petitioners' application for rehearing was denied on December 26, 1972. Petitioners' motion for leave to file a second petition for rehearing was denied on March 21, 1973 and April 25, 1973. Petitioners' application for an extension of time within which to file a petition for certiorari was granted on March 14, 1973 and extended Petitioners' time to and including May 25, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Did the Fifth Circuit commit error in refusing to certify controlling questions of Louisiana property law to the Supreme Court of Louisiana, where —

(a) the Fifth Circuit's decision reversed numerous determinations of Louisiana law made by a Louisiana district judge trained in the civil law; and where —

(b) the Fifth Circuit's decision neither cites nor relies upon any supporting precedent in Louisiana jurisprudence; and where —

(c) the State of Louisiana, upon study of the Fifth Circuit's decision, advised in an *amicus* brief that the Fifth Circuit's decision:

(1) contained basic and obvious errors of Louisiana statutory law and jurisprudence;
(2) was contrary to long-standing administrative construction and practice; and
(3) would have a staggering effect on the validity of land titles throughout the State?

2. Did the Fifth Circuit err in construing Louisiana law as follows:

(a) A Louisiana land patent, of record for seventy years, is invalid if it is determined that the Register of the State Land Office, the officer authorized by statute to sell the land, after the sale embezzled the purchase price that had been paid by an innocent patentee;

(b) In a suit attacking senior patents, a junior patentee may avoid the substantive requirements enunciated by the Louisiana Supreme Court in the landmark decision of *Albritton v. Shaw*, 148 La. 427, 87 So. 32 (1921) on grounds never sanctioned by any Louisiana court, including the distinction that the requirements only apply if the original of the patent is offered in evidence but do not apply where proof is made by use of a certified copy of the original;

(c) The after-acquired title doctrine is inapplicable to a deed to a bona fide purchaser for value if the deed contains a stipulation against warranty, even though the Louisiana Civil Code declares the non-warranty clause ineffective.

(d) Where the original land applicant acquires the first patent and subsequently transfers the land to a bona fide purchaser, a third party may question the consideration received by the State for the first patent, and

the State may validly issue a second patent on the same land. A corollary issue is whether such a construction is prohibited by Federal constitutional law under *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, and substantive due process.

(e) A patent is not retroactively valid to the date of application and therefore does not inure to the benefit of one who had acquired the entryman's rights.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Involved herein are Article 1, § 10 and Amendment XIV of the United States Constitution; the Rules of Decision Act, 28 U.S.C. § 1652; Louisiana Civil Code of 1870, Articles 2500-2506; Louisiana Revised Statutes of 1950, as amended, La. R.S. 13:3726 and La. R.S. 13:72.1, and Louisiana Session Law, Act 75 of 1880. The texts are printed as Appendix A.

STATEMENT OF THE CASE

Introduction

This title dispute stems from the dual issuance of patents by the State of Louisiana, and involves practices and procedures of the State going back more than one hundred years. Specifically at issue is whether Chevron Oil Company ("Chevron") should be required

to account for oil and gas worth $20,000,000 or more that it has extracted from Petitioners' lands. But the effect of the decision below far transcends the importance of this case to the immediate parties. Indeed, it potentially clouds the validity of land titles throughout Louisiana. As noted by the State of Louisiana in its *amicus* brief in support of the petition for rehearing in the court below (App. I, p. 112a):

> ". . . if the decision in this case is permitted to stand, as written or with no material changes in the rationale and conclusions, it may cause the long standing administrative construction of the public land laws of Louisiana to be relegated very largely to oblivion, and with it adversely affect the seemingly settled property law of Louisiana as it relates to land patents."

STATEMENT OF FACTS

For over 100 years the State of Louisiana has made its marshlands available for private ownership through payment of a statutory purchase price, as prescribed in a schedule revised from time to time by the Louisiana Legislature. Since 1871, it was the uniform practice of the Register of the State Land Office to collect the statutory purchase price from a purchaser of state marshlands, issue a receipt to him, and in due course transmit the money to the State Treasurer's office. The State Treasurer thereupon transmitted a receipt to the Register — not the pur-

chaser — which was filed in the Register's office and which became part of the official records of the State Land Office. The purchaser never received the Treasurer's receipt.[1]

In 1894, Octave Barrois applied to the State of Louisiana for patents to some 5465 acres of marshland and paid the requisite price ($683.11) to John S. Lanier, the incumbent Register (Def. Ex. 2). In 1898, formal patents issued, which were duly recorded in the Plaquemines Parish conveyance records (Def. Ex. 3a-3f). The next year, Barrois sold to Pierre Leon Buras 2355 acres of the land he had purchased which included the 1140 acres here at issue (Def. Ex. 29). Petitioners, most of whom are poor and uneducated, are Buras' heirs and assert ownership in this case through a chain of title commencing with the issuance of the 1898 patents.

On July 16, 1900, Register Lanier committed suicide. Subsequent investigation disclosed widespread negligence, mismanagement and dishonesty in his stewardship of the State Land Office. Among the matters un-

[1] Since 1871, the Louisiana procedures adopted for disposition of State lands have differed materially from those adopted by the Federal Government with respect to the disposition of its public lands. As noted by Chevron below, the procedure under the Federal system required an applicant to apply for and obtain a certificate from the Register, which he then took to the receiver of public moneys, to whom payment of the purchase price was made. A receipt issued by the receiver was delivered personally to the purchaser, who was obliged to surrender it to the Register at the time of the issuance of the patent (Resp. Opening Br. p. 33.) This is totally different from the administrative procedures adopted in Louisiana.

covered in the investigation was the fact that Register Lanier had apparently failed to transmit Barrois' payment to the State Treasurer's Office; at least no receipt from the Treasurer's Office was ever found.

In his zeal to recover for the State all that he regarded as its due, the new Register, though he examined the original 1898 patents and acknowledged their authenticity, insisted that Barrois once again pay the $683.11 purchase price to *him* (Def. Ex. 6 series).[2] Significantly, upon such payment in 1903, new letters patent issued over the signature of the Governor, before any Treasurer's receipts had been issued (Pl. Ex. 6 series). Moreover, the record established beyond doubt and Respondents have conceded that, contrary to the opinion of the Fifth Circuit, the 1903 payment, like the 1894 payment, was made to the Register, and not to the State Treasurer.[3]

Barrois assumed he could disregard his earlier sale to Buras, and he disposed of the land a second time, except for a 40-acre tract, the significant history of which is traced below. The United States and Chevron

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[2] Evidence of the existence of the 1898 patents was contained in the official records of the State Land Office, including numerous references in official correspondence and a notation in the order book made in connection with the issuance of the 1903 patents that because patents had been issued previously, the second payment need not be made in conformity with the higher purchase price prescribed by statute in 1902 and prevailing in 1903.

[3] A single check was forwarded to the new Register who acknowledged its receipt (Def. Ex. 6i). The Register obtained Treasurer's receipts in a smaller total amount because he deducted his fees before making payment to the Treasurer (Pl. Ex. 6 series).

claim title through a chain of title commencing with the issuance of the 1903 patents.

In the mid-1930's, when the Government was assembling tracts of land in Plaquemines Parish for the purpose of establishing a National Wildlife Refuge, it attempted to purchase the 40-acre tract from the Burases. But when negotiations failed, the Government brought proceedings to obtain the 40 acres through condemnation. In the condemnation proceeding, the Government named as defendants both the Buras family and those who might claim title under the junior patents. Upon closer scrutiny, however, the Government determined that the Buras title was obviously the valid one; and it thereupon amended its complaint to assert ownership in the Burases alone. A jury verdict was rendered which recognized the Buras family as the true owners.

Since the Buras title to the 40 acres was based upon the identical documents as their title to the lands here in dispute, it was obvious — even to the members of the uneducated Buras family — that, if their title was good as to the 40 acres, it was also good as to the remainder. Consequently, the Buras family embarked on a campaign for redress and help from the Government, a campaign that included the sending of letters to practically every responsible Federal official, including the President of the United States (Def. Ex. 55 series). Thus some five years before the discovery of oil and gas, the family was pressing the Government for recognition of the Buras title.

The response to these pleas for help was totally at variance with the standards of decency and fair deal-

ing which our citizens have a right to expect from the Government. The evidence, for example, establishes that in response to repeated protests, inquiries and requests for assistance from the Burases, the Government promised the Burases an administrative determination of the validity of their title. Time passed, and the Government consistently advised that the investigation was not yet complete; that the Burases had nothing to worry about; and that they would be fully informed of the Government's findings when the investigation was completed. (Def. Ex. 55 series). It was not until the Government had been in possession of the lands for more than ten full years that, in a routine response, it finally advised that no valid title in the Burases had been shown. (Def. Ex. 55 series)

The Government purported to base its conclusion on information in its files (Def. Ex. 55(y)). Yet it vehemently objected to the introduction of those files into evidence, succeeded at the trial in persuading the court to exclude them, and refused to produce at the trial the Government officials who had searched the records, interviewed all witnesses and were familiar with the contents of the Government reports and the underlying facts therein contained. The reason for the Government's unwillingness to make full disclosure to the jury of its conduct is obvious when the contents of the Government's files are analyzed.[4] These files disclose

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[4] Upon the rejection of these Government reports Petitioners made an offer as to their contents. Petitioners preserved the objection and contend that the trial court erred in excluding this clearly admissible evidence.

that, as early as 1946, the Government had concluded that its right to the property in question would be severely jeopardized "if the Buras claim fell into proper hands" (Def. Ex. 43 id.). After 1946, these reports speak more and more of reliance on adverse possession, and investigators were directed to document all possessory acts in order to establish a basis for such a claim (Def. Ex. 43c, 49 id.). In 1947, a Government investigator suggested to his superiors that perhaps the best thing to do was to tell the Buras family that it had no valid claim (Def. Ex. 47 id.). But the Government, anxious to perfect its claim of adverse possession before rejecting the claims of the Burases, did nothing.

As of 1947, the Government had been in possession of the lands at issue for some nine years. In Louisiana, one who possesses in *good faith* for ten years acquires ownership by adverse possession. It is inescapable that the Government, in its dealings with the Burases, deliberately lulled the members of the family into inactivity, exploiting to the fullest their poverty and lack of education, until it thought it could perfect its claim of adverse possession. This attempt, however, came to naught by virtue of a jury finding that the Government's possession of the Buras lands was in *bad faith* (App. G, pp. 99a-100a).

Even more reprehensible than the Government's conduct was that of Chevron. In 1949, Alan L. Lobrano entered into a mineral lease with the Government for an enormous tract of land, including the land here in dispute. Although Lobrano was the Clerk of Court of

Plaquemines Parish, he was acting in this transaction not in an official capacity, but in a private capacity in concert with Chevron. And Chevron, though disclosing to the Government that it was the real party in interest, went to great lengths to keep that fact from becoming public knowledge, going so far, in fact, as to allow five years to elapse before recording its ownership interest in the mineral lease on August 31, 1954.

Louisiana counsel for Chevron had rendered formal title opinions advising of the superior Buras record title prior to the commencement of drilling operations (Def. Ex. 51 series id.). In its successful effort to keep its title examination reports from the jury, Chevron unilaterally stipulated that it asked no rights except those available to a bad faith mineral producer and abandoned by further stipulation its earlier position of reliance upon the public records (R. Doc. 184; App. on Appeal, p. 209). Through these stipulations, Chevron was able to keep from the jury's eyes documents which would have shown not only that its counsel believed that valid record title was vested in the Buras heirs, but also documents establishing that Chevron made a deliberate decision at the highest corporate level to withhold from the Bureau of Land Management its title opinion for fear that the Bureau "would require settlement of the dispute prior to approval" of drilling operations (Def. Ex. 51 series id.). With the initials of the members of Chevron's management committee attesting the decision, successive memoranda were approved with the notation to "accept [the] risk." (Def. Ex. 51 series id.). Chevron was apparently unaware that another Government office that

"investigated" the Buras title had reached essentially the same conclusion — the Burases had valid record title.

Despite Chevron's unilateral stipulation which kept much evidence of its bad faith from the jury, other evidence of Chevron's bad faith was clearly established at the trial. Perhaps most revealing was the proof that Chevron had caused its engineers to prepare, for approval by the state mineral board, a misleading map which, incredibly, showed that the water bottoms of various streams belonged to the State of Louisiana everywhere except where they traversed Buras lands. This subterfuge was prepared for the obvious purpose of securing an enormous advantage under a peculiar Louisiana rule of adverse possession pertaining to contiguous tracts.[5] Despite these efforts by Chevron, the dictates of common sense prevailed at the trial, and the ploy was completely unsuccessful.

In summary, Chevron's conduct with respect to these transactions appears more consistent with the standards of the nineteenth century industrial robber barons

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[5] Numerous bayous and streams traversed the area of the lands in dispute. Louisiana law provides that if a tract of land is traversed by state-owned waterbottoms, the tract is divided into separate *noncontiguous* tracts. Possession must be shown as to *each* noncontiguous tract. By relying on the proposition that possession of part of a tract constitutes possession of the whole tract, and by attempting to carve out portions of the waterbottoms as not owned by the State, Chevron hoped to fashion but one huge, contiguous tract containing almost all of the oil wells and prove possession of this huge tract merely by proving possession of a small part of the land.

than with commonly accepted twentieth century concepts of responsible corporate citizenship.

Proceedings Below

A. Proceedings Prior to Judgment:

In 1954, shortly after the Chevron lease was recorded in Plaquemines Parish, the three surviving sons of Pierre Leon Buras and their nephews and nieces commenced suit in the Louisiana state courts against Chevron for an accounting of oil and gas extracted from the land here at issue. Although no claim was or could be asserted against the Government in the Louisiana state court proceeding, the Government placed its title in issue by commencing this action under 28 U.S.C. § 1345 in the United States District Court for the Eastern District of Louisiana. The state court proceeding was thereupon halted, denying the Buras family the opportunity of an adjudication by the Louisiana courts of its claim of ownership under Louisiana real property law. And although the Government and Chevron were nominally adversaries, the Government permitted Chevron to control the litigation throughout. This was only logical, since Chevron, not the Government, will bear the burden of accounting if the District Court's judgment is reinstated. Trial in this case was held in abeyance for a number of years at the request of Chevron and the Government because of the pendency of another case involving then common issues, and, in part, the same land, the *Leiter Minerals* case, which finally terminated in 1965. *United States v. Leiter Minerals, Inc.*, 381 U.S. 413, *remanding with directions*

to dismiss. After an unsuccessful attempt by Chevron and the Government to secure relief in the Fifth Circuit from the District Court's holding that the Buras heirs were entitled to a jury trial, the case finally went to trial in 1969 and was ultimately submitted on special interrogatories.

So far as here relevant, the jury determined that Pierre Leon Buras had been a *bona fide* purchaser for value from the patentee; that he was an innocent transferee who had no knowledge of any irregularities which may have occurred in the State Land Office; that he had no knowledge of any matter which could possibly have affected the validity of the 1898 patents; and that the Government's possession of the land at issue was in bad faith (App. G, pp. 99a-100a).

Since Chevron had already formally waived asserting any right accorded a good faith possessor, the issue of its good faith was not submitted to the jury.

B. Opinion and Judgment of the District Court:

The District Court, in an exhaustive opinion applying Louisiana law, held that the 1898 patents on which the Buras claim was based were valid. It held that, under the relevant Louisiana statutes, the Register of the State Land Office was designated as the State official charged with the responsibility of selling the State owned marshlands; that the Register was authorized by law to receive the purchase price; that payment to the Register, which was in conformity both with the statutes and long standing administrative practice, was both appropriate and proper; and that the Reg-

ister's subsequent misappropriation of the funds paid to him and his failure to obtain a receipt from the State Treasurer in no way affected the validity of the 1898 patents or the good title of the patentee's transferee.

In its charge to the jury, the District Court held that the doctrine of after-acquired title would be applicable in favor of Petitioners if Pierre Leon Buras was an innocent transferee. The jury so found. But because of the holding that the 1898 patents were valid, that issue was considered moot.

C. Opinion of the Fifth Circuit:

Contrary to the opinion of the District Court, the Fifth Circuit held that, even though Louisiana law designated the Register of the State Land Office as the person to sell State-owned marshlands, he was not empowered to receive the purchase price; that the Register was the agent of the purchaser and not the agent of the State; and that any misappropriation or mishandling by the Register was chargeable to the innocent patentee and his innocent transferee. Thus, by arriving at a series of conclusions concerning Louisiana law and practice which were diametrically opposed to those of the District Court, the Fifth Circuit held the 1898 patents invalid.[6]

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[6] A chart is reproduced in Appendix J which compares the respective views of the lower tribunals, as well as the State of Louisiana, as reflected in the *amicus* brief filed below.

The Fifth Circuit further held that, under Louisiana law, the invalidity of such patents could be established even against a *bona fide* purchaser from the patentee and that the State Land Office had jurisdiction to issue new patents to the same lands even after the lands had been transferred to a *bona fide* purchaser for value by the original patentee, thus adopting a view of Louisiana law in conflict with the historic constitutional decision of this Court in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87.

The Fifth Circuit further held that certified copies of patents were not entitled to the same credit as originals, notwithstanding the specific declaration of La. R.S. 13:3726 to the contrary; that, where proof of the issuance of patents had been established through the use of certified copies rather than originals, a third party could "go behind" the patents to scrutinize the consideration received by the State in connection with their issuance, although no inquiry would have been permitted if the originals had been offered in evidence; and that, in such a case, Louisiana law which denies a holder through a junior patent the right to attack the validity of a senior patent was inapplicable.

Finally, the Fifth Circuit held that Louisiana's after-acquired title doctrine was inapplicable to the 1899 deed from Barrois to Buras, thus adopting a view contrary not only to that of the District Court as reflected in its charge, but also to the unanimous view of all Louisiana state judges and commentators who have spoken on the issue.

D. The Application for Rehearing:

The District Court's opinion was rendered by Judge Herbert W. Christenberry, a judge trained in the civil law and steeped in Louisiana law and practice. By contrast, the Panel of the Court of Appeals was composed of judges from Georgia, Alabama and Texas, none of whom had been trained in Louisiana law and practice.

Upon examination, it was obvious that the Panel's unfamiliarity with Louisiana law and practice had led it into error. A petition for rehearing was filed, and the State of Louisiana, disturbed at the magnitude of those errors and the unsettling effect the Fifth Circuit's decision would inevitably have on Louisiana land law, filed an *amicus* brief in support of rehearing and requested the opportunity to participate in oral argument if the petition were granted.

The State asserted that "one well versed in the public land law of Louisiana easily discerns prominent errors in this Honorable Court's opinion. . ." (App. I, p. 112a), and then proceeded to describe the State administrative practice and legal principles which the Panel had apparently not comprehended. The State pointed out that under the long-settled administrative construction of Act 75 of 1880 and under the invariable Louisiana practice, all Registers through the years had in fact received the purchase price of lands sold under the Act and that a purchaser *could not* transact business with the Treasurer directly, but with the Register alone (App. I, p. 115a).

Thus, not only because of the dictates of Louisiana law but also in fairness to innocent purchasers, the State itself urged that the burden of any internal mishandling of State monies should properly fall on the State, not the individual citizen.

The State further urged that the Fifth Circuit ignored the well-settled legal principles that a patent issued under the great seal of the State of Louisiana vests legal title in the patentee, and thereby deprives the State Land Office of jurisdiction to issue subsequent patents to the same land; that a state patent valid on its face creates a legal presumption that all prerequisites preliminary to its issuance have been complied with; and that presumption may not be attacked except in circumstances concededly not here present.

Finally, the State pointed out that, under Louisiana law, a patent once issued is effective retroactively to the date of application to enter, and runs for the benefit of any assignee of the entryman irrespective of whether the assignment contains a warranty of title. Thus, even if the 1898 patents were invalid, the issuance of the 1903 patents would have perfected the Buras title based upon the 1899 Barrois-Buras transfer. *E.g., Woods v. Kimbal,* 5 Mart. (N.S.) 246 (La. 1826).

Concluding its brief, the State advised the Fifth Circuit of the chaos and uncertainty which would inevitably flow from its decision (App. I, p. 122a):

> "If the present decision stands, the State Land Office can expect a landslide business in verification of the validity of patents of record in the various parishes. Title examiners will no longer be able to rely on the fact of issuance of a patent as presumptive evidence that the statutory requirements for issuance have been met — a presumption that has heretofore been considered as conclusive once land is conveyed to an innocent purchaser. This Honorable Court may not consider this to be an unbearable burden on the State Land Office, but should this Court not also consider the vast extent of the unsettling influence that is being introduced for the first time in Louisiana's land law?"

While the petition for rehearing was pending, Louisiana passed a statute authorizing its Supreme Court to answer questions of Louisiana law certified to it by Federal appellate tribunals.[7] A supplemental petition for rehearing was thereupon promptly filed, requesting that the certification procedure be utilized in this case. The Court of Appeals nevertheless denied rehearing and declined to ask the one source competent to render a definitive statement of the applicable law for such a statement — a statement which, under the Louisiana certification statute, was available merely for the asking.

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[7] The text of the Louisiana certification statute, La. R.S. 13:72.1, is set forth in Appendix A, pp. 4a-5a, *infra*. The Louisiana Supreme Court has already amended its rules to provide for certification.

Chief Judge Brown dissented in an opinion which expounds at length on the many cogent reasons why the Court of Appeals should have obtained the guidance of the Supreme Court of Louisiana.* As noted by Chief Judge Brown (App. D, pp. 79a-80a):

> "It is that the merits are inescapably shrouded in ancient history, Louisiana practices in the administration of state land patent grants, and the intricacies of Louisiana law and procedure, that makes it imperative that these difficult questions be certified to the Supreme Court of Louisiana for a determination which will have both authoritativeness and finality. Since the panel acted without so much as mentioning either the strong showing for or the present statutory availability of such certification, the only way for this to be accomplished at this level is for us to grant rehearing en banc and then order such certification.
>
> "Although I avoid the merits as such, they are important in my approach. To reach its decision that certain patents granted by the State of Louisiana in 1898 to Octave Barrois were invalid under the then applicable Louisiana law, the panel had to first leap the purposefully erected hurdle of *Albritton v. Shaw*, 1921, 148 La. 427, 87 So. 32 — a Louisiana Supreme

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*See Chief Judge Brown's opinion in W. S. Ranch Co. v. Kaiser Steel Corporation, 388 F.2d 257 (10th Cir. 1967) *dissenting* from the Panel's refusal to abstain in a case strikingly similar to *Buras*. On certiorari, this Court reversed the Tenth

Court opinion of long and unquestioned validity. To propel it over this formidable bulwark the panel had to reach a now severely attacked construction of a Louisiana evidentiary statute. Having surmounted the procedural obstacles in its course, the Court then had to proceed to explicate the now ancient Louisiana land patent law and to delineate the scope of the Louisiana version of the cryptic doctrine of after-acquired title.

"Given the complicated and unique nature of these substantive and procedural questions of Louisiana land law, the panel's decision could have been no more than a guess — albeit an educated one."

* * * *

"Of course I recognize that under Article III we do have the duty to decide even the most abstruse matters — even in diversity cases where there is no readily available means to secure authoritative state decisions except in the really important rare cases. But where there is a method and the case is vital to state interests, it is the part of judicial statesmanship to exploit such procedures fully." (Footnotes omitted)

Circuit in a *per curiam* decision and ordered the parties to seek a determination of the state law question from the New Mexico Supreme Court. Kaiser Steel Corporation v. W. S. Ranch Co., 391 U.S. 593.

REASONS FOR GRANTING THE WRIT

I.

Apart from all other considerations, the assertion by the State of Louisiana that its vital interests are in jeopardy — that the opinion below is contrary to well-settled Louisiana law and practice and casts into doubt the validity of land titles throughout the State — is of itself sufficient reason to justify the issuance of the writ. *Clay v. Sun Insurance Office*, 363 U.S. 207; *cf. Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25.

II.

On numerous occasions, this Court has held that the Federal courts should abstain from deciding important unresolved state law questions so that the parties may obtain an authoritative determination from the state courts. *E.g., Railroad Commission v. Pullman Co.*, 312 U.S. 496; *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411; *Clay v. Sun Insurance Office*, 363 U.S. 207.

This doctrine of abstention has particular application where, as here, the questions involve matters intimately connected with state interests, such as the procedure for state sales of its public lands; the operation of State executive departments and the relationship between these departments; the construction, application and stability of its real property law; and the allocation of its natural resources. Similarly, ab-

stention is deemed appropriate where an authoritative interpretation of state law may permit resolution of the case without reaching a Federal constitutional issue. *Reetz v. Bozanich*, 397 U.S. 82; *Kaiser Steel Corporation v. W. S. Ranch Co.*, 391 U.S. 593; *Leiter Minerals, Inc. v. United States*, 352 U.S. 220; *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478; *Railroad Commission v. Pullman Co.*, 312 U.S. 496. And this procedure is particularly apt when the questions arise in a jurisdiction grounded in the Civil Law, which has a methodology and juridical tradition with which Federal appellate tribunals are not completely familiar. *Fornaris v. Ridge Tool Co.*, 400 U.S. 41; *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25; *see Shelp v. National Surety Corp.*, 333 F.2d 431, 435 (5th Cir. 1964).

The failure of the court below to remit the parties to the Supreme Court of Louisiana for determination of the controlling state law questions is inexplicable in the light of the decision of this Court directing abstention in *Leiter Minerals, Inc. v. United States*, 352 U.S. 220. That case involved the very lands here at issue. There, title turned upon interpretation of one section of a single statute, a matter not yet authoritatively decided by the Supreme Court of Louisiana. Here, many issues are presented — some never decided by the Louisiana Supreme Court and others decided by the Fifth Circuit, seemingly without regard to controlling Louisiana jurisprudence — each of which is at least as important as the single issue of state law in *Leiter* (See *infra*, Point III).

Moreover, there is an additional consideration — one that transcends this case and the specific legal questions here involved. This case presents the Court with a unique opportunity to lay down authoritative guidelines for the utilization of an emerging procedural device — certification — designed to provide a prompt and effective method to resolve, through resort to the only absolutely authoritative tribunal, important questions of state law.

It has long been obvious that the best and most certain way to find out what the Supreme Court of a particular state would say with respect to a particular question of state law is to ask it. This dictate of common sense lies at the root of the abstention doctrine. In an attempt to provide an expeditious procedure to obtain such a determination and to circumvent the difficulties presented by traditional procedures, the State of Florida, with what Mr. Justice Frankfurter later characterized as "rare foresight," enacted a statute permitting its Supreme Court to answer certified questions of state law at the request of Federal appellate tribunals.[9]

Although the Florida statue was an eminently sensible procedural tool for obtaining such determinations, fifteen years were to pass before the statute was first utilized by any court. Even then, the statute remained unique until 1965, when the legislatures of Maine, Washington and Hawaii enacted similar certification statutes. In 1966, the American Law Institute endorsed

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[9] Clay v. Sun Insurance Office, 363 U.S. 207, 212.

the certification technique, and the following year the Commission on Uniform State Laws adopted a Uniform Certification of Questions of Law Act.[10] Other states have followed this clearly developing trend so that the certification technique is now available in at least ten states, and there seems little doubt that it will shortly be available elsewhere on a widespread basis.

Although this Court has utilized the certification technique on three separate occasions,[11] it has yet to enunciate authoritative guidelines to assist the lower courts in determining the circumstances under which certification should be employed.

It seems clear that certification as a technique for resolving important state law questions is the way of the future. Certainly it should have been utilized here, where it was readily available. As Chief Judge Brown stated in his dissenting opinion below (App. D., pp. 88a-89a):

> "In these times when comity and abstention have become the by-line for Federal judges, it is unfortunate that the Fifth Circuit adopts this head-in-the-sand rejection of the State's effort to alleviate our *Erie* burden. Our wide experience with certification to the Flor-

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[10] The evolving pattern of certification statutes is treated in R. Lillich and R. Mundy, *Federal Court Certification of Doubtful State Law Questions*, 18 U.C.L.A. L.Rev. 888 (1971).

[11] Clay v. Sun Insurance Office, 363 U.S. 207; Aldrich v. Aldrich, 375 U.S. 75; Dresner v. City of Tallahassee, 375 U.S. 137.

> ida Supreme Court has not only proved its utility in sparing this court — and more importantly, the litigants — the risk of a wrong decision, but it has recently evoked a most favorable response from that tribunal. See *National Education Association, Inc. v. Lee County Board of Public Construction*, Fla. 1972, 260 So.2d 206."

This case presents a unique opportunity for this Court to structure the certification technique and guide the lower courts in its use. Indeed, such a decision may well act as a catalyst for the adoption of certification statutes in those states which have not yet adopted them, and thereby provide a carefully-designed tool for relieving Federal tribunals of the burden of second-guessing state courts on questions of state law in appropriate cases. Thus, the question of the proper utilization of the certification technique is a question of general applicability and increasing importance, which has not been, but should be, passed upon by this Court.

III.

A.

The essence of the Fifth Circuit's decision is that the 1898 patents were invalid because the State received no consideration for their issuance. The opinion does not question that the 1898 patents were based upon the first application, nor does it question that the statutory purchase price for the 1898 patents was paid by the applicant to the Register of the State Land Office.

In holding that parties claiming under the second patents, based upon the second application, could question the consideration received by the State for issuance of the first patents, the Fifth Circuit absolutely ignored four Louisiana Supreme Court holdings that are clearly controlling. In two early cases, *Smith v. Crandall*, 118 La. 1052, 43 So. 699 (1907) and *J. W. Frellsen & Co. v. Crandell*, 120 La. 712, 45 So. 558 (1908), the Court considered attacks on patents based upon alleged fraud and lack of consideration. The patents, however, had been issued to the parties who had first applied for them and at a time when the State Land Office had jurisiction to sell the lands. These cases held that *only the State* could attack patents in such instances, and that the State must do so in direct judicial proceedings instituted for that purpose. In *Frellsen*, the Court noted (45 So. 558, 560):

> "The alleged nullity is dehors the patents, and affects only the consideration received by the state when she parted with the title."

and held:

> "A patent under the great seal of the state vests the legal title in the patentee, segregates the land from the public domain, and deprives the land department of jurisdiction. Hence a subsequent application to enter the same land confers no inceptive rights on the applicant. *A patent cannot be revoked or set aside except upon judicial proceedings instituted on behalf of the sovereign.*" (Emphasis supplied.)

Two subsequent decisions also involved attacks on patents issued by the State to the first applicant. *State v. Sweet Lake Land & Oil Co.*, 164 La. 240, 133 So. 833 (1927); *O'Brien v. State Mineral Board*, 209 La. 266, 24 So.2d 470 (1945). In these cases, however, an additional element was present, namely, the original patentee had transferred the lands to a *bona fide* purchaser. Those cases held that *even the State* could not attack such patents because the presumption of compliance with all statutory requirements preliminary to patent issuance became *conclusive* at the time the property was transferred to a *bona fide* purchaser.

The jury specifically found that Buras was a *bona fide* purchaser for value when he acquired from Barrois in 1899. Thus, the failure of the Fifth Circuit to apply the four Louisiana precedents is nothing less than a refusal to follow the mandate of *Erie*.

There is nothing strange in the Louisiana rule insulating *bona fide* purchasers against attacks aimed at showing irregularities in patent issuance. Louisiana's rule follows the logic and tradition of the landmark case of *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87. That case involved *joint* fraud by the patentee and the Georgia Legislature, but this Court, speaking through Chief Justice Marshall, held that it was unconstitutional for Georgia to revoke the patents to the prejudice of an innocent transferee of the patentee.[12]

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[12] The primary constitutional basis of the decision was the impairment of contracts clause of Article 1, § 10 of the Constitution. The Fourteenth Amendment was not adopted when *Flet-*

Any state action permitting revocation of original patents to the prejudice of a *bona fide* transferee would appear to be the functional equivalent of the unconstitutional action attempted by Georgia. But the Fifth Circuit has interpreted Louisiana law to permit this very result. As pointed out in the State's *amicus* brief below, the State *required* all purchasers to deal with the Register who was authorized by statute to sell state lands. The State *required* all purchasers to pay the Register, and it was the Register's duty to deposit the purchase price in the state treasury. Since the patentee complied with mandatory state procedures in obtaining formal patents, the State of Louisiana, like the State of Georgia, should be powerless to urge official fraud as a basis for attack on patents that had been transferred to a *bona fide* purchaser.

While the four Louisiana Supreme Court decisions are dispositive on the question of record title in the instant case, they were not even mentioned in the Fifth Circuit's opinion, which, instead, is based upon an incredible tangent.

In *Albritton v. Shaw*, 148 La. 427, 87 So. 32 (1921), the Louisiana Supreme Court considered a situation where a state patent had been issued to one *other* than the first applicant. After approving the general rule as to the conclusive nature of the presumption of validity of a patent, the Court stated (87 So. 32, 34):

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cher was written. Today, Fourteenth Amendment due process would be equally applicable.

> "But the essential element of that rule is the supposed authority of the officers who signed it to issue the patent."

The Court further stated that since the first person was entitled to have a patent issued to him based upon the earlier application, the land department had no legal authority or jurisdiction to issue it to a subsequent applicant. The Supreme Court then formulated the only exception to the general rule prohibiting an individual from attacking a state patent (87 So. 32, 34):

> "The two prerequisites of the right of an individual to attack the validity of a land patent are: *First*, that the individual making the attack had an equitable title or an inceptive right upon the land, *antedating* the issuance of the patent; and *second*, that the attack is aimed at the jurisdiction or legal authority of the officers of the land department to issue the patent." (Emphasis supplied.)

The Fifth Circuit conceded that the two prerequisites announced in *Albritton* are not present here, and hence found that the exception permitted by *Albritton* was inapplicable. But, it then allowed Respondents to attack the senior 1898 patents although *Albritton* afforded the *only* playground where junior patentees are allowed. In short, having decided that the exception to the general rule was inapplicable, the Fifth Circuit then ignored the general rule itself, as defined in the four Louisiana Supreme Court decisions.

Apart from the Fifth Circuit's failure to recognize that its rejection of *Albritton v. Shaw* left the result reached in conflict with the Louisiana jurisprudence, its reasons for distinguishing *Albritton* constitute an exercise in circular reasoning that cannot withstand scrutiny.

The Fifth Circuit starts with the basic proposition that, inasmuch as Petitioners proved the existence of the 1898 patents through certified copies rather than originals,[13] the *genuineness* of the patents was thus open to question under the specific language of the statute authorizing the use of such copies.[14] But

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[13] Under Louisiana practice, the original patent was delivered to the patentee and subject to loss or misplacement over the decades since its issuance. In this connection, it is particularly noteworthy that, like the Buras heirs, the Government could not produce the originals of the 1903 patents upon which it and Chevron rely.

[14] La. R.S. 13:3726 provides:

> "§ 3726. Public land patent, certificate or receipt; admissibility of copy of record
>
> Where a patent for land, or the certificate of the register, or the receipt of the receiver, whether issued, or to be issued, by the officers of the State of Louisiana, or the general government has been, or may hereafter be recorded in the office of the recorder of the parish in which the land may be situated, a copy of such record properly certified by the parish recorder, shall be admissible in evidence in all causes pending before any of the courts, in the same manner, and *shall be entitled to the same credit as the original of such instruments, or as exemplification thereof;* provided, the party proposing to use such evidence shall make affidavit that the original of such patent or certificate is not in his possession or under his control. However, the opposite party shall be allowed to disprove the genuineness of such original or registry, as the case may be." (Emphasis supplied.)

genuineness would be equally open to question if the parties had offered the original patents in evidence, as the statute itself states. The obvious purpose of the statutory provision is to assure that certified copies of documents are given *no greater weight* than would be accorded to the originals.[15] Instead, the Fifth Circuit emasculated the statute, specifically designed to grant relief to those whose patents are lost or unavailable, by refusing to follow the statutory mandate that the certified copy "shall be entitled to the *same credit* as the original of such instrument."

Proceeding from the conceded premise that *genuineness* — a factual issue — is open to question, the Court concluded that the question of *validity* — a legal issue — was also open to scrutiny and that the "burden of proof" with respect to a question of law rested upon Petitioners.[16]

Turning to the question of validity, the Fifth Circuit found the Petitioners had not met their "burden of proof," that the 1898 patents were invalid for lack of consideration and failure of the State to establish internal procedures in conformity with what the Fifth

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[15] See the district court's opinion for a lucid exposition of the reasons why the statute's earliest predecessor was passed in 1861 (App. B, pp. 35a-37a).

[16] Even if the court's unwarranted expansive interpretation of "genuineness" were correct, the Fifth Circuit still placed the so-called "burden of proof" on the wrong party, since the statute specifically declares:

> "[T]he opposite party [Chevron and the Government] shall be allowed to disprove the genuiness of such original or registry, as the case may be." La. R.S. 13:3726 (1950).

Circuit conceived to be the Louisiana statutory provisions. By this process of reasoning the Court concluded that the patents were invalid . . . and therefore not patents . . . and therefore not senior patents . . . and therefore not within the *Albritton* doctrine.

To arrive at this result the Fifth Circuit chose to engage in the very type of inquiry precluded by the four Louisiana Supreme Court decisions — an inquiry into compliance by the senior patentee with the prerequisites to the issuance of a patent at the behest of a junior patentee who cannot meet the requirements of *Albritton* quoted above. Obviously, if it is permissible to determine the validity of senior patents in order to determine whether a junior patentee can attack it, the only patents to which *Albritton* will apply are senior patents issued in compliance with all technicalities of state law. But then the *Albritton* doctrine need not be invoked — the senior patents would be sustained on their own merits. Thus, as a practical matter, the Fifth Circuit read *Albritton* out of Louisiana law.

Other grounds adduced by the Fifth Circuit to circumvent the *Albritton* doctrine strain belief:

Thus, the argument that a junior patentee is not bound by *Albritton* because his patents were issued in "complete compliance" with state law ignores this obvious truth: if the senior patents are unassailable, the State was without jurisdiction to issue the junior patents. Hence, the junior patents could not have been issued in "complete compliance" with State law.

In stating, moreover, that the 1898 senior patents were invalid, the Fifth Circuit said (App. C, p. 74a):

> *"If [the Governor's] signature was affixed without benefit of the Treasurer's receipt. . .* it was not in compliance with the governing law and therefore could not cure the defects which existed in these patents." (Emphasis supplied)

And yet the *1903* patents were also signed by the Governor "without benefit of the Treasurer's receipt," since the documents show on their face that the patents were signed and issued before the Treasurer's receipts were obtained! Thus, under the Fifth Circuit's own opinion, the 1903 patents could not possibly have been issued in "complete compliance" with Louisiana law. There could be no clearer example to show the Fifth Circuit's total misconception of Louisiana's actual administrative practices. The documentation reflecting the issuance of the 1903 patents shows that the State was correct when it stated in its *amicus* brief that the sole function of a Treasurer's receipt was for internal bookkeeping.

Finally, it seems clear that the application of *Albritton* cannot be made to turn on fortuitous circumstances such as the identity of the person in possession at the time suit is instituted or whether the junior patentee is plaintiff or defendant. These factors have nothing whatever to do with the rationale of the requirements of *Albritton*, requirements designed to insure the sanctity of, and certainty of title flowing from, the earliest patent.[17]

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[17] In holding that the State of Louisiana retained jurisdiction after issuance of the 1898 patents to issue new patents on the same land in 1903 and that a third party could attack the validity

B.

Having improperly reached the question of the validity of the 1898 patents, the Fifth Circuit held that they were not valid because the purchase price had not reached the State Treasurer. We have heretofore adverted to the many misconceptions of Louisiana law, administrative construction and practice which underlie this holding and do not, therefore, repeat them here. It is sufficient merely to note that the Fifth Circuit's holding is based in substantial part on judicial opinions dealing with the Federal land patent system, a system quite the opposite of that adopted in Louisiana, and overthrows more than 100 years of administrative statutory construction and practice. The Fifth Circuit thus failed to follow the deeply-entrenched, unquestioned

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of the 1898 senior patents, the Fifth Circuit further ignored a very recent Louisiana appellate court decision, Valvoline Oil Co. v. Concordia Parish School Board, 216 So.2d 702 (La. App. 3d Cir. 1968). *cert. denied.* There, as here, a third party attempted to attack the validity of a state patent; claimants under the first patent had not been in possession for sixty years; the original patent was not before the Court, but a certified copy was; and the Court held (p. 708):

> "[T]his patent is presumed to have been validly issued and signed. *This presumption continues until the patent is annulled in court proceedings instituted for that purpose.*" (Emphasis supplied.)

Here, no court proceeding has been brought by the State to annul the original 1898 Barrois patents; therefore, they cannot be assailed by the Government or Chevron. In *Valvoline,* a subsequent Register cancelled the original patent because he believed it was invalid. The *Valvoline* court held that the Register's cancellation was "of no effect" since the State had never brought an action to annul the patent. Similarly, any action by Register Smith (who succeeded Lanier), including his subsequent issuance of the 1903 Barrois patent, can have no adverse effect on the validity of the 1898 Barrois patents.

Louisiana rule that the long-standing construction by administrative officials placed upon an ambiguous statute, such as Act 75 of 1880, should not be overruled unless manifestly erroneous. *E.g., State v. Standard Oil Co. of Louisiana*, 190 La. 338, 182 So. 531 (1938); *St. Bernard Syndicate v. Grace*, 169 La. 666, 125 So. 848 (1930); *accord, United States v. Jackson*, 280 U.S. 183, 193. Louisiana officials have not only interpreted Act 75 of 1880 as authorizing payment to the Register of the State Land Office but have *required* purchasers to pay the purchase price to the Register, and not to the State Treasurer.

C.

Under Louisiana's doctrine of after-acquired title, a purchaser of land acquires good title to land if his vendor subsequently perfects title, even though the vendor's title was defective at the time of the initial conveyance. As such, the doctrine operates to enforce the vendor's warranty against eviction arising out of his personal acts, a warranty the Louisiana Civil Code specifically states is not subject to contractual waiver. La. Civ. Code art. 2504 (1870); *Cattle Farms, Inc. v. Abercrombie*, 211 So.2d 354 (La. App. 4th Cir. 1968), *reh. denied.*

In light of the civil law concept of *caveat venditor* (not *caveat emptor*) and the doctrine of implied warranty embodied in Civil Code Article 2501 *et seq.*, the Louisiana Supreme Court said in *Waterman v. Tidewater Associated Oil Co.*, 213 La. 588, 35 So.2d 225, 233 (1947), a case involving a mere quitclaim deed:

"It is easy to see why one, who sells with warranty, becomes estopped from thereafter acquiring a title to the prejudice of his grantee. To hold that the title he acquires inures to his grantee is really nothing more than an enforcement of the grantor's obligation to deliver a good title. *And it may even be proper to extend application of the doctrine to a sale without warranty where the land conveyed is adequately described.* In such a case, it might be argued that the vendor would be precluded from subsequently acquiring an adverse title to the prejudice of the vendee under Article 2504 of the Civil Code, which declares that:

"'Although it be agreed that the seller is not subject to warranty, he is, however, accountable for what results from his personal act; and any contrary agreement is void.'

"See also Articles 2503 and 2505." (Emphasis supplied.)

The view that the after-acquired title doctrine applies to sales of land to a *bona fide* purchaser where warranty is expressly excluded has been uniformly adopted by all Louisiana state judges and commentators, whose opinions, under civil law methodology prevailing in Louisiana, are entitled to special weight.[18]

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[18] Comment, 23 Tul. L. Rev. 154 (1948); Comment, 23 Tul. L. Rev. 533, 542 (1949); Comment, 18 La. L. Rev. 312, 313 n. 3 (1958); Comment, 27 La. L. Rev. 576, 578 (1967); *see, e.g. Rycade Oil Corp. v. Board of Commissioners*, 129 So. 2d 302 (La. App. 3d Cir. 1961), *cert. denied;* A. Rubin, *Sales*, 9 La. L. Rev. 215, 221 (1945).

The Fifth Circuit's opinion completely ignored these well-settled civil law concepts and commentators. Instead, it chose to rely on certain general dicta in *Butler v. Bazemore*, 303 F.2d 188 (5th Cir. 1962), which case, in more specific dicta, requires the doctrine's applicability to this case.[19] But if dicta be the polestar, the relevant dicta to be followed was *not* that of the Fifth Circuit but that of the Supreme Court of Louisiana in *Waterman*, quoted above. Certainly, on this question also, a ruling from the Supreme Court of Louisiana is necessary since the issue has not been decided definitively by that Court and a finding in Petitioners' favor on this issue would require reversal irrespective of any other adverse finding of law by the court below.

IV.

It is possible that in the fullness of time, and long after the claims of the Burases are put to rest, the havoc unintentionally but demonstrably flowing from the decision below may be repaired by the Louisiana Supreme Court in other proceedings. Thus, the failure of the Buras heirs to obtain redress in this case may result in one rule of law being applied to their claim and another rule of law being applied to all others. The late Justice Frankfurter adverted to the patent injustice of such a result in another case in which the Fifth Circuit attempted to apply the "plain meaning" rule to a Louisiana statute:

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[19] 303 F.2d 188, 194 n. 11.

> "A Louisiana statute apparently seems to grant such a power. But that statute has never been interpreted, in respect to a situation like that before the judge, by the Louisiana courts and it would not be the first time that the authoritative tribunal has found in a statute less than meets the outsider's eye. Informed local courts may find meaning not discernible to the outsider. The consequence of allowing this to come to pass would be that this case would be the only case in which the Louisiana statute is construed as we would construe it, whereas the rights of all other litigants would be thereafter governed by a decision of the Supreme Court of Louisiana quite different from ours." *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 30; *accord, Kaiser Steel Corporation v. W. S. Ranch Co.*, 391 U.S. 593, 594.

It would be the crowning irony if, after the inequitable conduct of the Government in lulling the Burases into inactivity for many years and the deceit of Chevron in depriving the Burases of their patrimony, Louisiana law were ultimately set aright for all citizens except the Burases.

CONCLUSION

For each of the foregoing reasons, Petitioners re-

spectfully pray that their Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTIONAL PROVISIONS INVOLVED

U. S. Constitution, Article I, § 10.

No State shall ... pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts....

U. S. Constitution, Amendment XIV, § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES STATUTE INVOLVED

28 U.S.C. § 1652

§ 1652. *State laws as rules of decision*

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

LOUISIANA STATUTES INVOLVED

Louisiana Civil Code, Articles 2500-2506 (1870)

Art. 2500. Eviction is the loss suffered by the buyer of the totality of the thing sold, or of a part hereof, occasioned by the right or claims of a third person.

Art. 2501. Although at the time of the sale no stipulations have been made respecting the warranty, the seller is obliged, of course, to warrant the buyer against the eviction suffered by him from the totality or part of the thing sold, and against the charges claimed on such thing, which were not declared at the time of the sale.

Art. 2502. That the warranty should have existence, it is necessary that the right of the person evicting shall have existed before the sale. If, therefore, this right before the sale was only imperfect, and is afterwards perfected by the negligence of the buyer, he has no claim for warranty.

Art. 2503. The parties may, by particular agreement, add to the obligation of warranty, which results of right from the sale, or diminish its effect; they may even agree that the seller shall not be subject to any warranty.

But whether warranty be excluded or not the buyer shall become subrogated to the seller's rights and actions in warranty against all others.

Art. 2504. Although it be agreed that the seller is not subject to warranty, he is, however, accountable for what results from his personal act; and any contrary agreement is void.

Art. 2505. Even in case of stipulation of no warranty, the seller, in case of eviction, is liable to a restitution of the price, unless the buyer was aware, at the time of the sale, of the danger of the eviction, and [or] purchased at his peril and risk.

Art. 2506. When there is a promise of warranty, or when no stipulation was made on that subject, if the buyer be evicted, he has a right to claim against the seller:

1. The restitution of the price.

2. That of the fruits or revenues, when he is obliged to return them to the owner who evicts him.

3. All the costs occasioned, either by the suit in warranty on the part of the buyer, or by that brought by the original plaintiff.

4. The damages, when he has suffered any, besides the price that he has paid.

LOUISIANA REVISED STATUTES

La. R.S. 13:72.1 *Declaration of state law to federal courts*

A. The supreme court of this state may, by rule of court, provide that when it shall appear to the Supreme Court of the United States, or to any court of appeals of the United States, that there are involved in any proceeding before it questions or propositions of the laws of this state, which are determinative of the said cause, and there is no clear controlling precedent in the decisions of the supreme court of this state, such federal appellate court may certify such questions or propositions of the laws of this state to the supreme court of this state for instructions concerning such questions or propositions of state law, which certificate the supreme court of this state may, by written opinion, answer.

B. The supreme court of this state is hereby authorized and empowered to collaborate with any and all other courts of last resort of other states and of the United States in the preparation and approval of uniform rules of court to make effective this and similar laws.

La. R.S. 13:3726. *Public land patent, certificate or receipt; admissibility of copy of record*

Where a patent for land, or the certificate of the register, or the receipt of the receiver, whether issued, or to be issued, by the officers of the State of Louisiana,

or the general government has been, or may hereafter be recorded in the office of the recorder of the parish in which the land may be situated, a copy of such record properly certified by the parish recorder, shall be admissible in evidence in all causes pending before any of the courts, in the same manner, and shall be entitled to the same credit as the original of such instruments, or as exemplification thereof; provided, the party proposing to use such evidence shall make affidavit that the original of such patent or certificate is not in his possession or under his control. However, the opposite party shall be allowed to disprove the genuineness of such original or registry, as the case may be.

LOUISIANA SESSION LAW
ACT 75 of 1880

Entitled an act to readjust the State Land Office; appointment of a Register to fix his salary and the time and manner of paying said salary; to define the powers and prescribe the duties of the Register; to fix the fees for certificates and patents and disposition thereof; the price of lands, and disposition of the proceeds; duties of the Auditor of Public Accounts, State Treasurer; Attorney General and the Governor; to provide for the payment of salary and expenses incurred in the State Land Office; to repeal all conflicting laws.

Section 1.

Be it enacted by the General Assembly of the State of Louisiana — That there shall be established under the provisions of this Act an office for the sale of public

lands donated to the State by Congress, which office shall be administered by a Register, said office to be located at the seat of government of the State of Louisiana.

Section 2.

Be it further enacted, etc; That the Governor, by and with the consent of the Senate, shall appoint, under the provisions of this Act a Register who shall hold his office for the term of four years whose annual salary shall be fifteen hundred dollars in full compensation for his services as Register, payable quarterly by the Treasurer of the State on the warrant of the Auditor of Public Accounts, said salary to be paid out of the swamp land fund only. He shall take the oath prescribed by the Constitution and laws, and give bond in favor of, and to be approved by the Governor of Louisiana, with one or more good and sufficient sureties, in the sum of five thousand dollars, conditioned for the faithful performance of the duties of his office, which bond so approved, shall be filed by the Register in the office of the Secretary of State.

Section 3.

Be it further enacted, etc; That it shall be the duty of the Register to keep accounts of the sales of lands donated to the State in well bound books, with the number of the certificate issued therefor, setting forth the section, parts of sections, township and range district and Parish, to whom and when sold, and for what price; and shall cause to be marked on the official plats or maps on file in his office, the number of certificates which books and maps shall be preserved as

official records. It shall be the duty of the said Register to furnish annually to the Auditor of Public Accounts on or before the twentieth day of December of each year, a descriptive list, by Parish, of all lands sold during the preceding year together with all data that may be afforded by his records.

Section 4.

Be it further enacted, etc; That all money arising from the sale of warrants of Public land, shall be paid by the purchaser to the State Treasurer, on the warrant of the Auditor of Public Accounts, whose duty it shall be to warrant at once on the Treasurer of the State to receive said money within forty eight hours after the issuance of the same by the Auditor.

Section 5.

Be it further enacted, etc.; That the Register of the State Land Office shall on the sale of lands or warrants, describe the same in his order on the Treasurer of the State to receive the money for said lands, and in no case shall an entry be made upon the books, maps, or other official record, until the receipt of the Treasurer, also describing the land or warrants, has been submitted and filed in his office; a violation of this section, shall be deemed a felony, and upon conviction the party offending shall pay a fine of five thousand dollars and be imprisoned for a term not exceeding ten nor less than two years. It shall be the duty of the Auditor of Public Accounts to transmit, within forty days after the expiration of each fiscal year, the report of the Register mentioned in section three of this Act, to the Assessor of the Parish wherein the lands may

be situated, in order that they may be assessed for taxes.

Section 6.

Be it further enacted, etc; That the Register shall collect, from parties purchasing lands the sum of 25 cents for each certificate of 40 acres; the sum of 50 cents for each certificate of 80 acres: the sum of $1 for each certificate of 160 acres; and the sum of $2 for each certificate of 320 acres; and the sum of $4 for each certificate of 640 acres; whenever such certificates are issued by him; and he shall charge and collect the sum of $2 for each patent prepared by him and signed by the Governor; and that the fees charged and collected by the said Register, under this Act, shall be received by him for the use and benefit of the State, and shall be paid quarterly by the said Register to the Treasurer, who shall credit the appropriate land fund of the State with the same.

Section 7.

Be it further enacted, etc; That the Treasurer, as receiver of the State Land Office from, and after the promulgation of this Act, shall deliver to the purchaser or his agent, a receipt which shall contain a correct description by section, township and range, of the lands sold by the State for which said Treasurer shall receive no extra compensation.

Section 8.

Be it further enacted, etc; That persons holding legally issued outstanding, unlocated school, internal improvement or other State land warrants, or who have

heretofore entered, located, or purchased or who may hereafter locate or purchase school or internal improvement warrants of the State of Louisiana legally issued, and where the location, entry or purchase has been rejected by the United States on land belonging to the general government, he or they shall have a right hereafter to locate said warrant on any lands belonging to the State.

Section 9.

Be it further enacted, etc; That the Attorney General of the State of Louisiana shall give his opinion and counsel to the said Register whenever requested in any matter pertaining to the duties or business of the said Register's office.

Section 10.

Be it further enacted, etc; That the public lands donated by Congress to the State of Louisiana, shall be subject to entry and sale at the rate of seventy five cents per acre for any number of acres; and any person making affidavit that he or she enters for his or her own use and for the purpose of actual settlement and cultivation, and together with the said entry, he or she has not acquired from the State of Louisiana, under the provisions of this or any Act graduating State Land more than 160 acres according to the established surveys shall be allowed to enter 160 acres at the rate of twelve and one half cents per acre.

Section 11.

Be it further enacted, etc; That the public lands donated by Congress to the State of Louisiana, designated

as sea-marsh or prairie subject to tidal overflow so as to render them unfit for settlement and cultivation, shall be subject to entry and sale at the rate of twelve and a half cents per acre, provided, that satisfactory proof of said fact be filed with the Register of the State Land Office.

Section 12.

Be it further enacted, etc; That the Register of the State Land Office shall be authorized, and it shall be his duty to administer any oath or oaths which may be required by law in connection with the duties of his office.

Section 13.

Be it further enacted, etc; That all salaries and expenses incurred under the provisions of this Act shall be paid by the Treasurer of the State of Louisiana, on the warrant of the Auditor of Public Accounts out of the swamp land fund and no other.

Section 14.

Be it further enacted, etc; That it shall be the duty of the Governor, when applied to, to issue patents for all lands sold on presentation of the Treasurer's receipt, and for lands located by warrants whenever he shall be satisfied that the same have been legally sold and located.

Section 15.

Be it further enacted, etc; That all laws and parts of laws in conflict with the provisions of this Act be

and the same are hereby repealed, and that this Act shall take effect from and after its promulgation.

s/ R. N. Ogden
Speaker of the House of Representatives
/s/ S. D. McEnery
Lieutenant Governor and President of the Senate

Approved April 9th 1880

/s/ Louis A. Wilty
Governor of the State of Louisiana

UNITED STATES OF AMERICA
STATE OF LOUISIANA
Wade O. Martin, Jr.

I, the undersigned Secretary of State, of the State of Louisiana do hereby certify that the annexed and following pages contain a true and correct photostat copy of the enrolled bill which became Act No. 75 of the 1880 Regular Session of the Louisiana General Assembly, as shown by comparison with the original on file in the archives of this office and is therefore a true and correct copy of said Act.

In testimony whereof, I have hereunto set my hand and caused the Seal of my Office to be affixed at the City of Baton Rouge on, this the 27th day of December, 1966.

(Seal)

/s/ WADE O. MARTIN, JR.
Secretary of State

APPENDIX B

OPINION OF THE DISTRICT COURT

UNITED STATES OF AMERICA

versus

LEON BURAS, JR., et al.

Civ. A. No. 4977.

United States District Court,
E. D. Louisiana,
New Orleans Division.

July 8, 1970.

CHRISTENBERRY, District Judge.

On March 1, 1955, the United States, plaintiff, instituted this action against the heirs of Pierre Leon Buras, seeking to quiet its title to property located in Plaquemines Parish, Louisiana. The disputed property constitutes part of the Delta National Wildlife Refuge.[1] The Government also made its mineral lessees,

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[1] A description of the disputed lands is:
The Northeast Quarter (NE¼), and the Southeast Quarter of the Southwest Quarter (SE¼ SW¼) of Fractional Section Twenty-three (23); The East Half (E½) of Fractional Section Twenty-six (26), North-

Allen L. Lobrano and the heirs of Frank J. Lobrano, parties defendant as well as The California Company (now Chevron Oil Company) and Leiter Minerals, Inc.[2]

"in order that all persons asserting any right or claim to the property may be before the court."

This litigation is the result of a state court suit filed on November 18, 1954, by the heirs of Pierre Leon Buras (hereinafter referred to as the Buras heirs) asserting title to the lands in dispute and seeking the eviction of the mineral lessees of the United States.[3] The in-

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west of Main Pass; the East Half (E½) of Section Twenty-seven (27); the Southeast Quarter (SE¼), and the South Half of the Southwest Quarter (S½ SW¼) of Section Twenty-eight (28); The South Half of the Southwest Quarter (S½ SW¼) of Section Thirty-three (33); The Northwest Quarter (NW¼) of Fractional Section Thirty-four (34); all in Township Twenty South (T 20 S), Range Nineteen East (R 19 E), St. Helena Meridian, Louisiana.

The East Half (E½) of Fractional Section Three (3) Northwest of Main Pass; and the Northeast Quarter (NE¼) and the Southwest Quarter (SW¼) of Fractional Section Four (4), Northeast of the Forty Arpent Lines; all in Township Twenty-one South (T 21 S), Range Nineteen East (R 19 E), St. Helena Meridian, Louisiana.

[2]The Chevron Oil Company acquired operating rights under the mineral leases granted to the Lobranos by an agreement with them. Under the authority of these leases eight producing oil wells have been drilled on the lands in dispute. Leiter Minerals, Inc. by a compromise agreement dated July 25, 1966, was dismissed from the suit. See fn. 5 *infra*.

[3]This suit is entitled Leon Buras, Jr., et al. v. The California Company, et al., No. 3577 of the records of the Twenty-fifth Judicial District Court for the Parish of Plaquemines, State of Louisiana.

stant action, brought pursuant to 28 U.S.C. § 1345[4] seeks to quiet the title of the United States and enjoin permanently the prosecution of the state court suit. A temporary injunction was not applied for due to an agreement between counsel that the state proceedings would not be prosecuted pending the final disposition of this case.

The Buras heirs answered the government's complaint admitting that the United States is presently the possessor of the disputed lands. But they denied that the government is the owner of the said lands or the mineral rights thereon, and have counterclaimed that they are the true and lawful owners of the said lands and mineral rights thereon. In addition, the Buras heirs filed a crossclaim against defendants Chevron Oil Company and the individual parties named Lobrano, seeking an accounting and money judgment against these parties for the extraction of minerals without right or legal authority. A trial by jury was demanded by the Buras heirs.

Subsequently, motions to strike the Buras heirs' demand for a jury trial were filed by the plaintiff, United States and by defendants, Chevron Oil Company and the individual parties named Lobrano. This court denied both motions and certified that decision for interlocutory appeal, pursuant to 28 U.S.C. § 1292(b). On

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[4] 28 U.S.C. § 1345 states:

> "Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress."

February 23, 1967, the United States Court of Appeals for the Fifth Circuit denied the movers' application for leave to appeal from this court's interlocutory order.

On January 11, 1967, this court granted an unopposed motion for partial summary judgment on behalf of the plaintiff United States, quieting its title to an undivided one-half interest in the minerals and mineral rights in the disputed lands. This judgment was based on three compromise agreements: one between Leiter Minerals, Inc. and the Buras heirs; another between Leiter Minerals, Inc. and the United States, Chevron and others; and the third between the present parties to this suit.[5]

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[5]Thomas Leiter, in his sale to the United States on December 21, 1938, reserved the mineral rights subject to certain limitations. The mineral leases by the United States were executed on the understanding that this reservation had expired. However, Leiter conveyed the reserved rights to Leiter Minerals, Inc., Louisiana corporation, and in 1955, when the instant suit by the United States against the Buras heirs was filed, separate litigation was pending between the United States and Leiter Minerals, Inc. concerning the status of the Leiter mineral reservation. The claim of the Buras heirs being founded on title matters prior to Leiter's ownership of the lands, both of the claims were adverse to each other as well as to the United States. On August 19, 1958 the Buras heirs and Leiter Minerals, Inc. entered into a compromise between themselves, each side conveying to the other fifty percent of its claim to the mineral rights beneath the disputed lands. By a 1965 compromise agreement executed between Leiter Minerals, Inc., the United States, and other interested parties, Leiter relinquished all its claims, including the fifty percent interest it had acquired from the Buras heirs in the mineral rights beneath the disputed lands. Coincidentally, a separate compromise agreement was entered into between the Buras heirs, the United States and other interested parties, whereunder

Later, cross motions for partial summary judgment on the issue of title were filed by the Buras heirs and the government, Chevron, and the individual parties named Lobrano, and were subsequently denied by this court. A pretrial conference was held and this matter was set for trial.[6] However, on the scheduled date of trial, some thirteen years after the original filing of this action, a surprise motion to intervene was filed on behalf of the heirs of one Amelie Elodie Buras, purportedly the legitimated daughter of Pierre Leon Buras. These parties (hereinafter referred to as the intervenors) alleged that they are legal heirs of Pierre Leon Buras and are necessary parties to this suit. Following the court's granting of the motion to intervene, the United States, Chevron, and the individual parties named Lobrano moved for and were granted a continuance of the trial date.

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the Buras heirs relinquished any claim they had acquired from Leiter in Leiter's claim to the mineral rights beneath the disputed lands. Such agreement stipulated that the remaining claim of the Buras heirs through Pierre Leon Buras, defined as their original claim less the one-half of mineral rights transferred by the Burases to Leiter, was not being compromised. The result is that in the instant litigation the claim of the Buras heirs continues for the entirety of the surface of the lands in dispute but is reduced to fifty percent of the mineral rights. In recognition of this, the court granted partial summary judgment on January 11, 1967, in favor of the United States, quieting its title to an undivided half interest in the minerals and mineral rights.

[6]The large four-volume record in this case reflects the numerous conferences held, as well as the vast amount of discovery completed in the fifteen year old litigation.

The Buras heirs subsequently moved for a summary judgment dismissing the intervenors and this court denied that motion. They later sought to have the intervenors' claims tried separately from the rest of the case. This motion was also denied.

A trial by jury commenced on April 17, 1969. The court reserved ruling on all motions for directed verdict and submitted the case to the jury using two sets of special interrogatories and a map.[7]

The jury answered all of the interrogatories save the first one of the first set and decision of this case is complicated by their inability to agree upon an answer to that question.

THE UNITED STATES' CLAIM

The United States seeks a decree quieting its title to the land in litigation, removing and canceling all instruments of the Buras heirs which evidence any claims to the land, these claims being clouds upon the

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[7]The first set of interrogatories submitted to the jury contained questions as to the good or bad faith possession of the United States and its predecessors in title. The questions submitted in the second set of interrogatories to the jury pertaining to the adverse possession of the various possessors in the United States' chain, depended on the jury's answers to the good or bad faith questions in the first set. Also in the first set the jury was required to determine the navigability of various streams, which findings were transmitted to a map showing the streams and the various tracts which were separated by these streams. This map was used by the jury in its deliberations on the second set of interrogatories pertaining to the adverse possession of the various tracts.

title of the United States.[8] The government alleges that it is the owner and possessor of the property in dispute under a perfect record chain of title emanating from patents issued by the state of Louisiana and of record in the State Land Office at Baton Rouge. It further alleges that if any adverse claims to any of the land exist, these claims have been acquired by the government and its predecessors in title under acquisitive prescription based on ten or thirty-year adverse possession.

The property in question was acquired by the government from Thomas Leiter by deed dated December 21, 1938, and registered on December 28, 1938, in COB 92, folio 468 of the records of Plaquemines Parish, Louisiana. Thomas Leiter inherited the lands from the estate of his father, Joseph Leiter in 1932. The bulk of the disputed lands was acquired by Joseph Leiter from Malcolm J. Taylor and Fay S. Dean on May 29, 1916.[9] Taylor, Dean and Jefferson C. Wenck together pur-

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[8]The government also seeks a permanent injunction enjoining the Buras heirs from asserting any rights to the disputed lands and a permanent injunction enjoining the Buras heirs from prosecuting the case of Leon Buras, Jr., et al. v. The California Company, et al., No. 3577 of the Docket of the Twenty-fifth Judicial District Court of the Parish of Plaquemines, Louisiana.

[9]Included in this sale was the land on which the eight oil wells are now situated. The remainder of the lands in dispute was acquired by Leiter as follows: the SW ¼ of Sec. 4, T 21 S, R 19 E, by patent to Leiter directly from the state in 1918; the E ½ of Sec. 3, T 21 S, R 19 E, and NW ¼ of Sec. 34, T 20 S, R 19 E, by deed to Leiter from Delta Duck Club on November 28, 1921. The chain into Delta Duck Club on the latter lands goes back to a conveyance from Octave Barrois to Nicholas Frey dated August 6, 1908, and Barrois acquired such lands under patents from the state dated October 23, 1903.

chased these lands from Augustin A. Buras on June 2, 1911, and Taylor acquired Wenck's interest on April 22, 1912.

Augustin A. Buras had acquired on May 11, 1911, some of the disputed lands directly from the state of Louisiana under patents of record in the State Land Office.[10] These lands were included in the sale by Augustin A. Buras to Taylor et al. The rest of the disputed lands included in the 1911 conveyance from Augustin A. Buras to Taylor et al. was acquired by Augustin Buras on July 17, 1906, from Dr. John N. Thomas, to whom Augustin Buras had previously conveyed on May 27, 1905. Augustin Buras originally had acquired the lands from Octave Barrois on November 12, 1903. Barrois acquired the lands under patents from the state of Louisiana dated October 23, 1903, of record in the State Land Office. It is from this chain of title that the United States bases its claim in this case.

Further, the United States has pleaded title by acquisitive prescription under the deed to it from Thomas Leiter in 1938, under the deed from Taylor and Dean to Joseph Leiter in 1916, and also under the deed from

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[10]The following portions of the disputed lands were patented to Augustin A. Buras in 1911:

The East Half of Fractional Section 26, Northwest of Main Pass, and the North Half of Southeast Quarter of Section 28, T 20 S, R 19 E, and the Northeast Quarter of Fractional Section 4, northeast of the forty arpent line, T 21 S, R 19 E.

Augustin A. Buras to Taylor, Wenck and Dean in 1911.[11]

THE BURAS HEIRS' CLAIM

The Buras heirs have answered the complaint of the United States, asserting title to the disputed lands under a deed from Octave Barrois to Pierre Leon Buras, their ancestor. The deed is dated January 5, 1899, and the sale was based on patents of the state of Louisiana to Octave Barrois dated November 12, 1898. These patents were recorded in the official conveyance records of Plaquemines Parish; however, their recordation cannot be ascertained in the State Land Office. The Buras heirs assert in their brief: "[T]he Barrois-Buras sale [of 1899] is the fountainhead of the ownership claim of the Buras heirs. Pierre Leon Buras never alienated the lands sold to him by Barrois, and by inheritance, his heirs have succeeded to his ownership."

Alternatively, the Buras heirs contend that if the 1898 patents issued to Octave Barrois are invalid and the later 1903 patents obtained by Octave Barrois are valid, then the title thus acquired by Barrois inured to the benefit of Pierre Leon Buras under the doctrine of after-acquired title by virtue of the 1899 recorded sale from Barrois to Buras prior to the issuance of the 1903 patents.

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[11]The United States has also pleaded prescription under the 1918 patent to Leiter covering the SW ¼ of Sec. 4, T 21 S, R 19 E and under the Leiter acquisition through Delta Duck Club of the NW ¼ of Sec. 34, T 20 S, R 19 E and the fractional E ½ of Sec. 3, T 21 S, R 19 E.

The Buras heirs further claim that there was no possession of the subject lands adverse to Pierre Leon Buras or his heirs, prior to 1917. Further, they contend that Joseph Leiter, one of the predecessors in title of the United States, abandoned possession of the lands from 1921 to 1927, a period of six years. This was supposedly the result of a hunting accident in which his ten year old son was killed.

Finally, the Buras heirs contend that the Government's acquisitive prescription period was interrupted when the Government "assured" the Buras heirs that their claims would be investigated; that such assurance lulled them into a false sense of security and that the Government should not be permitted to acquire by acquisitive prescription, to their prejudice.

TITLE

The question of title in this case turns on (1) the validity of the 1898 patents issues to Octave Barrois and (2) the effect of the subsequent recorded sale from Barrois to Pierre Leon Buras in 1899.

Buras and Barrios were brothers-in-law who in the 1880's hunted and trapped in the area known as Cubit's Gap.[12] Barrois operated on the lands immediately be-

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[12]The lands in dispute are marsh lands in the area known as Cubit's Gap, which extend eastward to the sea from the rear of the river lots along the Mississippi River in the vicinity of Main Pass. In ancient times there was little or no land to the rear of these river lots and the opening which today is Main Pass did not exist. However, in 1862 a ditch was dug connecting the River and the sea and from that ditch Main

low Main Pass, while Buras took as his operating area the lands north of Main Pass. Eventually, in 1894, Octave Barrois, having decided to apply to the State of Louisiana for purchase of a portion of these lands on which they were operating, paid some money to the Register of the State Land Office, John S. Lanier. Lanier issued a certificate to Barrois dated April 7, 1894, setting forth the land description, area, and amount paid in connection with the application. This certificate was duly recorded in the conveyance records of Plaquemines Parish. The testimony of the Buras heirs is to the effect that Pierre Leon Buras had furnished a portion of the money to Barrois to make the application.

On November 12, 1898, Barrois obtained patents on the lands for which he held Lanier's certificate. These patents were issued over the seal of the state and purportedly were signed on behalf of the state by then Governor Murphy J. Foster as well as Register Lanier. These patents were recorded in the official conveyance records of Plaquemines Parish. Barrois promptly executed the January 5, 1899 deed to Pierre Leon Buras conveying some 2355 acres of the lands on the north side of Main Pass. This sale while without warranty was regular in every respect, having been passed before a notary public and two witnesses, and was properly recorded.

Pass, or Cubit's Gap, resulted. The lands of Cubit's Gap were subsequently built up by deposits from the waters of the river flowing through Main Pass.

On July 16, 1900, Register Lanier committed suicide. An investigation of his activities by his successor, James M. Smith, revealed that Register Lanier's administration had been marked by negligence, mismanagement and dishonesty.[13] Regarding the Barrois patents of 1898, there was no record that any money was paid to the State Treasurer and also there was no record in the State Land Office of any sale of land to Barrois.[14] Smith, the new Register, took the position that he would not consider as valid any patents issued for which Lanier had received payment unless he could

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[13]The initial investigation was primarily concerned with monies received by Lanier on applications for entry where no patents had been issued and contained a request for an opinion of the Governor as to the legal rights of the applicants:

> "These applications cover a period of several years, but they were generally made from 1895 to July 14, 1900. A few were made prior to that date. Besides these my office is in receipt of letters claiming that other applications and remittances were made, giving dates and amounts of which I find no record. As none of this money has been turned into the State Treasury nor into my hands, I cannot allow the entries and issue patent therefor, and I would like to know the legal status of these applications, and what rights, if any, should be accorded to the applicants." (Defendants' [1-26] Ex. 4c.)

A further explanation of the condition of the records was made by the new Register when he submitted his Biennial Report for the years 1900-1902. That report revealed that Register Lanier had the sum of $1,107.04 on deposit in the Bank of Baton Rouge at the time the new Register took office and that the sum was transferred to the account of the new Register. The individual sources of this fund were never traced and to do so now would be impossible.

[14]While the 1898 patents refer to various certificate numbers as underlying them, the certificates bearing those numbers were in fact issued to other persons and covered entirely different lands.

further determine that Lanier had deposited the money in the State treasury.

Precisely how Barrois discovered the presence of a potential defect in his patents is not known. But word of the new Register's position eventually reached various individuals in Plaquemines Parish, who wrote to Smith on behalf of Barrois.[15] After a meeting between Barrois, his attorney, and Register Smith on February 25, 1903, and subsequent letters between the parties, the state issued the 1903 patents to Barrois. On the Register's official "order-book" there was a notation in the margin regarding the land described in the 1903 patents:

> "Applied for prior to Act 125 of 1902, and patents issued for same by the then Register, John S. Lanier. But no money having been paid into the State Treasury, and there being no evidence in the records of these entries, this order is now issued."

Further Barrois was given the benefit of a saving clause under Act 125 of 1902, relative to the purchase price to be paid. Act 75 of 1880 stipulated a purchase price in the amount of 12 1/2¢ per acre. However, Act 125 of 1902 increased this price to 25¢ per acre, reserving to prior applicants the right to purchase at

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[15]Letters were written to the new Register by Dr. John Thomas, who was in charge of the Quarantine Station; Mr. John Dymond, Jr., an attorney in Plaquemines Parish who represented Barrois; Mr. Jefferson C. Wenck, a New Orleans Notary Public, and Mr. William A. Wenck, a New Orleans attorney.

the former price and Barrois was permitted to pay the old price.

According to the records of the State Land Office, the first patents to Octave Barrois were issued on October 23, 1903. These patents are the foundation of the chain of title of the plaintiff, United States. Upon the issuance of these patents, Barrois proceeded to dispose of the subject lands a second time.[16] He conveyed a part of the lands to Augustin A. Buras in 1903 and portions to Nicholas Frey in 1908. The government eventually acquired the lands from the succeeding transferees of Augustin Buras and Nicholas Frey.

After the conveyance by Octave Barrois to Augustin Buras in 1903, the lands conveyed were assessed to Augustin Buras and the later transferees in that chain of title descending into the United States. In 1908, in the succession proceedings of Pierre Leon Buras, his property was sold and partitioned, but no claim to the subject lands was mentioned.

VALIDITY OF 1898 PATENTS

The first interrogatory submitted to the jury asked: "Did the Governor of Louisiana sign the 1898 patents to Octave Barrois involved in this case? Please an-

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[16]The 1903 patents issued to Barrois included practically all those lands covered by the 1898 patents that had been sold by Barrois to Pierre Leon Buras on January 5, 1899. The rest of these lands were subsequently patented in part to Augustin A. Buras in 1911 (see fn. 10 *supra*) and in part to Joseph Leiter in 1918 (see fn. 9 *supra*). The government later acquired these lands.

swer yes or no." The jury considered this interrogatory and could not agree on an answer.

Initially, the problem that confronts this court is whether it can now answer this interrogatory. I am aware of the United States Court of Appeals for the Fifth Circuit's opinion in Roberts v. Pierce, 398 F.2d 954 (5th Cir. 1968), reversing a trial judge who directed a verdict after a jury's failure to agree had resulted in a mistrial. There the court said that the conflicting evidence presented a question for the jury. Further, the cases of Union Pacific Railroad Company v. Bridal Veil Lumber Co., 219 F.2d 825 (9th Cir. 1955), and Iacurci v. Lummus Co., 387 U.S. 86, 87 S.Ct. 1423, 18 L.Ed.2d 581 (1967), lend support to the view that this court should not "go it alone" and answer the question. 219 F.2d at 831-832. In light of this jurisprudence, a conference was held on March 25, 1970, with all counsel present to discuss the matter. The court has now decided that the first interrogatory presented a legal question and that it was a mistake to have submitted it to the jury. Only questions of fact, not law, are to be put to a jury. *Cf.* Ratigan v. New York Central Railroad Co., 291 F.2d 548, 555 (2d Cir. 1961), cert. denied sub nom. New York Central R. R. Co. v. Interstate Commodities, Inc., 368 U.S. 891, 82 S.Ct. 144, 7 L.Ed.2d 89 (1961). And while on its face this interrogatory seeks an answer to a question of fact the real question involved is one of law, namely, whether or not the 1898 patents are valid, and in answering this question consideration must be given to the effect of legal presumptions. The originals of the 1898 patents were not produced. That such patents were issued is evidenced by

handwritten copies of the patents certified to by the Recorder for the Parish of Plaquemines as having been recorded in the Conveyance Records of the Parish on January 2, 1899. The validity of these patents involves questions of law. To expect or require a jury to decide these questions would give the jury "an unnecessary legal workout which was far beyond their comprehension, and outside their sole function to decide issues of fact." Ratigan v. New York Central Railroad Co., 181 F. Supp. 228, 232 (N.D.N.Y. 1960).

While the United States has invoked the jurisdiction of this court under 28 U.S.C. § 1345, the case is governed by the law of Louisiana, both statutory and jurisprudential. Leiter Minerals, Inc. v. United States, 329 F.2d 85 (5th Cir. 1964), remanded with directions to dismiss, 381 U.S. 413, 85 C.T. 1575, 14 L.Ed.2d 692 (1965). *Cf.* Wallis v. Pan American Petroleum Corp., 384 U.S. 63, 86 S.Ct. 1301, 16 L.Ed.2d 369 (1966); United States v. Certain Property, etc., 306 F.2d 439 (2d Cir. 1962). The plaintiff, United States, has set forth its title to the disputed lands emanating from the state of Louisiana by virtue of the 1903 patents to Octave Barrois. Its possession of these lands are admitted by the Buras heirs. Since the Buras heirs have asserted title to land which is in the possession of the United States, they have the burden of proving their title. Manhattan Land & Fruit Co. v. Buras, 43 F.Supp. 361, 365 (E.D.La. 1942). *Cf.* Arent v. Hunter, 171 La. 1059, 133 So. 157, 162-163 (1931). They have attempted to sustain this burden by introducing certified copies of the 1898 patents issued to Octave Barrois as they were recorded and indexed in the conveyance records of Plaquemines

Parish and the deed executed by Barrois to Pierre Leon Buras, the Buras heirs' ancestor, dated January 5, 1899, which deed purported to convey to Pierre Leon Buras, without warranty, all of the lands here in dispute. The heirs also introduced the record from Plaquemines Parish of a "statement of costs" issued by Register Lanier to Octave Barrois in 1894, which shows that Barrois applied to purchase the disputed lands.

The United States disputes the validity of the 1898 patents and contends that as a third party it was not charged with knowledge of the issuance of these patents since there is no record of them in the State Land Office in Baton Rouge.

Generally, a patent recorded in the State Land Office gives notice to third parties. Recordation of a patent in the conveyance records of the parish in which the land is located is not required. Kittridge v. Breaud, 2 Rob. 40 (1842); Tear v. Williams, 2 La.Ann. 368 (1847); St. Paul v. Louisiana Cypress Lumber Co., 116 La. 585, 40 So. 906 (1906); McQueen v. Flasdick-Black Land & Lumber Co., 135 La. 698, 65 So. 900 (1914); Chalmers v. Frost-Johnson Lumber Co., 143 La. 836, 79 So. 424 (1918). The government contends that the corollary of this jurisprudence is that recordation of a patent in the records of the parish where the land is situated is not notice to third parties. This is a non sequitur. In all the cases cited above, there was no prior patent recordation in the situs parish before the issuance of any other patents by the state.

The public records doctrine in Louisiana emanates from the provisions for recordation contained in the Civil Code, Articles 2251-2266.[17]

Article 2264 provides:

> "Notarial acts concerning immovables, effective date as against third persons
>
> 2264. No notarial act concerning immovable property shall have any effect against third persons, until the same shall have been deposited in *the office of the parish recorder, or register of conveyances of the parish where such immovable property is situated.*" (Emphasis supplied.)

Article 2265 provides:

> "Recordation of judicial sales, marriage contracts and judgments affecting immovables
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> 2265. All sales of immovable property made by any sheriff or other officer, by virtue of any execution or other order of court; all marriage contracts made within this State, tending in any wise to convey, transfer, assure or affect the estates of the parties, or being only intended to ascertain the dotal rights of the wife, or that her marriage portion is liable to some reserves, or stipulated to be paraphernal or ex-

[17]See also La.Const. art. 19, § 19 (1921), as amended by La Act 1938, No. 35.

tradotal property; and all final judgments affecting immovable property *shall be recorded in the parish where the immovable property is situated.*" (Emphasis supplied.)

Article 2266 provides:

"Effectiveness of unrecorded acts affecting immovables; effect of subsequent recordation

2266. All sales, contracts and judgments affecting immovable property, *which shall not be so recorded,* shall be utterly null and void, except between the parties thereto. The recording may be made at any time, but shall only affect third persons from the time of the recording.

The recording shall have effect from the time when the act is deposited in the proper office, and indorsed by the proper officer." (Emphasis supplied.)

It is clear from a reading of these articles that recordation in the parish where the land is located is public notice to third parties.[18] Even if an act is ac-

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[18]La.R.S. 9:2721 (1950) provides:

"§2721 Filing in office of parish recorder:

No sale, contract, counter letter, lien, mortgage, judgment, surface lease, oil, gas or mineral lease or other instrument of writing relating to or affecting immovable property shall be binding on or affect third persons or third parties unless and until filed for registry in the office of the parish recorder of the parish where the land or immovable is situated; and neither secret

tually recorded, but could not be found from the indices because it is not indexed properly, it is nevertheless effective against third persons. Central Lumber Co. v. Whittington, 12 La.App. 695, 127 So. 79 (2d Cir. 1930); Agurs v. Belcher & Creswell, 111 La. 378, 35 So. 607 (1903). While it is not necessary to record a patent in the parish where the land is located, it does not follow that if a patent is duly recorded, such recordation will not constitute public notice.

Perhaps the strongest case that the government relies on in support of its argument is Ellis v. Louisiana Planting Co., 146 La. 652, 83 So. 885 (1920). There a conflict existed between the records of the State Land Office and the Terrebonne Parish records regarding what tracts of land had been conveyed by the state. The court said that the record in the State Land Office governed and that the *subsequent* recordation in Terrebonne Parish was of no benefit to the plaintiff. In the same case, regarding another tract of land, the court held that a prior certificate of entry recorded in the Land Office which was followed by a patent prevailed over a subsequent conveyance by the state prior to the issuance of the patent. On the issue of notice of the entry the court said:

> "This receipt *may or may not be recorded,* as the entryman chooses, *but the record which the register is required to keep* is the thing to which one dealing with the property is required

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claims or equities nor other matters outside the public records shall be binding on or affect such third parties. Acts 1950, 2nd Ex.Sess. No. 7, § 1."

to look to ascertain whether or not it is still susceptible of purchase or entry. The purpose of the record is to afford notice to all those dealing with the state that property entered thereon has been removed from the class which can be disposed of by it until such time as the entry is canceled or confirmed by patent. The certified copy or exemplification from the land office was admissible in evidence, not for the purpose of establishing title in Young, or his subsequent vendees, but to show that the defendants and their vendors had notice of the fact that the property was not among that which the state owned, in the sense that it was susceptible of transfer at the time Act 97 of 1890, granting to the levee board lands 'which it now owns or may hereafter acquire' within said district, was passed." 83 So. at 886 (emphasis supplied).

It is important to note the differences between the *Ellis* case and the instant one. In *Ellis* there was a prior record of certificates of entry in the State Land Office before the state alienated the land to the other party. In the instant case, there is no record of any kind prior to the recordation of the patent in the situs parish. In *Ellis*, the Register did his statutory duty according to Act 75 of 1880, § 3, which provides in part:

"Sec. 3. *Be it further enacted, etc.*, That it shall be the duty of the register to keep accounts of the sales of lands donated to the State, in well bound books, with the number of

> the certificate issued therefor, setting forth the section, parts of sections, township and range, district and parish, to whom and when sold, and for what price, and shall cause to be marked on the official plats or maps on file in his office the number of certificates, which books and maps shall be preserved as official records. * * *"

In the instant case, the Register did not record the 1898 patents. This was a duty statutorily imposed on him, not on Barrois, the patentee. The rationale of the jurisprudence holding *sales* effective against third persons if the instrument is deposited for recordation and endorsed by the proper officer, even though never actually recorded, is applicable here. Schneidau v. New Orleans Land Co., 132 La. 264, 61 So. 225 (1913). The Register was the proper officer to record these patents and there is no reason to impose his failure to perform his statutory duty on Barrois, especially so, in view of the fact that Barrois did record the patents, where he could do so, in the parish where the land was located. Finally, in the *Ellis* case, the land was situated in Lafourche Parish and the recordation relied on by the plaintiffs was in Terrebonne Parish. The court said that since there was a prior record of the plaintiff's claim in the State Land Office "[t]he question of registry does not enter into the matter, since plaintiff has a valid title, and defendant has not." In the instant case there was recordation of the patents in the parish where the land was situated and there is, again, no prior record anywhere to antedate this patent recordation. *Cf.* Coyle v. Allen, 168 La. 504, 122 So. 596 (1926).

At this point, it is important to remember that the recordation serves only as notice to third parties and is not in itself a source of any rights. In recording his patents Barrois protected against third parties any interests that the patents conveyed to him. The fact that they were recorded outside the chain of title held by the United States is of no moment. What is important is that they were properly recorded on the public records in the parish where the land is located, and that third parties are charged with knowledge of every material fact contained in those records. Any unrecorded interests which are subject to the recordation law are "utterly null and void" as to third persons, even if they have actual knowledge of the unrecorded interest. McDuffie v. Walker, 125 La. 152, 51 So. 100 (1909).

In Egle v. Constantin, 198 La. 899, 5 So.2d 281 (1941), the court said in dicta that the public was not charged with notice of a patent until it was recorded in the parish where the land was located. That case dealt with the validity of a tax sale and did not involve an issue of conflicting patents. However, the court's gratuitous statement there lends support to the view of this court that recordation in the situs parish is public notice.

Further, La. R.S. 13:3726 (1950) is indicative of the legislative view concerning the recordation of patents in the situs parish. It provides:

> "Public land patent, certificate or receipt; admissibility of copy of record

Where a patent for land, or the certificate of the register, or the receipt of the receiver, whether issued, or to be issued, by the officers of the State of Louisiana, or the general government has been, or may hereafter be *recorded in the office of the recorder of the parish in which the land may be situated,* a copy of such record properly certified by the parish recorder, shall be admissible in evidence in all causes pending before any of the courts, in the same manner, and shall be entitled to the same credit as the original of such instruments, or as exemplification thereof; provided, the party proposing to use such evidence shall make affidavit that the original of such patent or certificate is not in his possession or under his control. However, the opposite party shall be allowed to disprove the genuineness of such original or registry, as the case may be." (Emphasis supplied.)

The historical context of this statute is relevant here. In 1855, the state by Act 290 of the 15th of March of that year (page 350 of the Acts of 1855), created a land office at the seat of government, to be administered by the register of the said office who was to be appointed by the Governor, with the consent of the Senate. Betz v. Illinois Central R. Co., 52 La. Ann. 893, 24 So. 644, 646 (1898). On January 26, 1861, the state of Louisiana seceded from the Union by passage of an ordinance of her secession convention. The same convention passed an ordinance under which the state assumed ownership and control of all unappropriated public lands within its boundaries, including the public

lands of the United States. The legislature, on February 28, 1861, by Act 44 (page 33 of the Acts of that year) appointed a committee to examine and report on the situation of the Louisiana public lands of the state and the United States.

It was in this context that Act 55 of 1861 (page 41 of the Acts of that year) was passed on March 1, 1861. That act was the antecedent of the present La. R.S. 13:3726 which tracks the language of its predecessor almost verbatim. It may appear that this statute is merely evidentiary, since it provides for the admissibility of copies of patents duly recorded in the parish where the land is located. However, it appears that another purpose of this statute was to allow a holder of a patent from the United States (general government) to prove his title claim by evidence of the patent's recordation in the situs parish since the records of the United States probably were not available due to the state's secession and the impending Civil War.[19]

It is important to note the statute provides that a patent must have been duly recorded to be effective against third persons. This is consistent with this court's view of the public records doctrine. The statute includes, not only patents of the general government, but also those issued by the state of Louisiana. Finally, the subsequent reenactments of Act 55 of 1861 to

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[19] On the 21st day of March, 1861, the legislature by virtue of Act 267 (page 205 of Acts of that year) established a general land office and remodeled entirely the land system of the state. This, in effect, repealed Act 290 of 1855, which had established the state land office. Betz v. Illinois Cent. R. Co., 52 La.Ann. 893, 24 So. 644, 648 (1898).

Rev.St. 1870 § 1445, to La.R.S. 13:3726 (1950), demonstrate the legislative intent with respect to the notice effect of a patent's recordation in the parish where the land is situated.

For these reasons, this court holds that the United States as a third party was charged with knowledge of the 1898 patents since they were duly recorded in Plaquemines Parish, the parish where the land is located.

The thrust of the government's argument disputing the validity of the 1898 patents is that they are procedurally defective. It contends that a valid purchase from the state was not consummated, since there is no record of any money being paid by Barrois to the State Treasurer pursuant to the provisions of section 4 of Act 75 of 1880 and that Register Lanier was without authority to receive payment for the patents.[20] Fur-

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[20]Section 4 of Act 75 of 1880 provides:

> "That all money arising from the sale of warrants of public land shall be paid by the purchaser to the State Treasurer, on the warrant of the Auditor of Public Accounts, whose duty it shall be to warrant at once on the Treasurer of the State to receive said money within forty-eight hours after the issuance of the same by the Auditor."

The above extract is from a copy of the original enrolled bill certified by the Secretary of State of the State of Louisiana as being a true and correct copy of Act 75 of 1880. (See Defendants' [1-26] Ex. 10).

The Government contends the words "warrants of public land" should read "warrants or public land" since this is the wording in the promulgated version of the statute as printed in the session laws of 1880. Further the remnant provisions of this statute as they appear today in La. R.S. 41:7 uses the word "or" rather than "of."

Louisiana courts have long held that clerical errors, misprints,

ther, there is no evidence of any certificates of purchase having been issued by the State Treasurer to Barrois underlying the 1898 patents.[21]

One problem with the government's attack is its procedural capacity to maintain it. A patent issued is evidence showing complete and absolute divestiture of title of the state. In Simien v. Perrodin, 35 La.Ann. 931 (1883), the court recognized that while a receiver's receipt or certificate of purchase had some legal effect, it was not of equal dignity with a patent. *Cf.* Burton Swartz Cypress Co. v. Baker-Wakefield Cypress Co., 163 La. 992, 113 So. 219 (1927). A patent is conclusive until it is set aside in a judicial proceeding. In Stone v. United States (United States v. Stone) 2 Wall. 525, 535, 69 U.S. 525, 535, 17 L.Ed. 765 (1865), the Court said:

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improper translations, grammatical mistakes, and improper punctuation in a statute may be recognized and corrected by the courts to carry out the real intention of the legislature. Succession of Barr, 219 So.2d 817 (La.App.2d Cir. 1969), writ refused, 254 La. 5, 222 So.2d 64 (1969); Scurto v. Le Blanc, 191 La. 136, 184 So. 567 (1938); State v. Rogers, 148 La. 653, 87 So. 504 (1921); City of Crowley v. Police Jury of Acadia Parish, 138 La. 488, 70 So. 487 (1915). Obviously, this court must follow the express intention of the Louisiana legislature and construe the act as originally enacted. *Cf.* Mataya v. Delta Life Ins. Co., 222 La. 509, 62 So.2d 817 (1953); Black v. Louisiana Central Lumber Co. 161 La. 889, 109 So. 538 (1926). However, this construction is not relevant to the court's opinion as will be shown later.

[21]Section 14 of Act 75 of 1880 requires:

> "*Be it further enacted*, etc., That it shall be the duty of the Governor when applied to, to issue patents for all lands sold, on presentation of the Treasurer's receipt and for lands located by warrants, whenever he shall be satisfied that the same have been legally sold and located."

> "A patent is the highest evidence of title, and is conclusive against the government and all claiming under junior patents or titles, until it is set aside or annulled by some judicial tribunal. * * * Patents are sometimes issued unadvisedly or by mistake, where the officer has no authority in law to grant them, or where another party has a higher equity and should have received the patent. In such cases courts of law will pronounce them void. The patent is but evidence of a grant, and the officer who issues it acts ministerially, and not judicially. If he issues a patent for land reserved from sale by law, such patent is void for want of authority. But one officer of the land office is not competent to cancel or annul the acts of his predecessor. That is a judicial act, and requires the judgment of a court."

This principle of law is applicable even in the case of a patent issued under an unconstitutional act of Congress. *In re* Emblen, 161 U.S. 52, 56, 16 S.Ct. 487, 40 L.Ed. 613 (1896). In Vavoline Oil Co. v. Concordia Parish School Board, 216 So.2d 702, 706 (La.App. 3d Cir. 1968), the court stated:

> "These lands were actually sold and a patent issued. The jurisprudence of this state is established that patents, valid on their face, are presumed valid until revoked by a judgment of court in judicial proceedings instituted for that purpose."

In the instant case Register Smith, Lanier's successor, apparently did not regard the 1898 patents issued initially to Barrois as valid, since he initiated the issuance of the subsequent 1903 patents to Barrois. However, it is clear that he had no authority to do so. He could not declare the 1898 patents invalid at his own whim. In the case of Prater v. Craighead, 118 La. 627, 43 So. 258 (1907), Register Smith followed a different procedure to cancel an illegal patent. The statement of the case by the court states:

> "That the pretended patent to B. A. Hampton for said land was issued through an error on the part of the register or clerk in the land office at Baton Rouge, and that, when the error was discovered by James M. Smith, register of the land office, the said illegal patent to Hampton was promptly and duly cancelled on the 5th day of December, 1899, with full and legal notice to him and to any and all persons claiming title by or through or under him, which *judgment* was duly recorded in Book of Conveyances in St. Mary parish on January 8, 1904." 43 So. at 260 (emphasis added).

It is strange that Smith took court action in that case to cancel the alleged illegal patent while he took no such action with regard to the Barrois 1898 patents. With these patents, he apparently *sua sponte* decided that the state should issue a second set of patents — the 1903 patents. It is this duplication of patents that created the dual title chains that are the basis of this lawsuit.

Once the state of Louisiana divested itself of ownership of the disputed lands by the 1898 patents it had no interest in those lands that it could convey in 1903. It could not by any act transfer any interest in that property in 1903, if the 1898 patents are valid. The presumption is that they are valid since they have not been judicially attacked for over fifty years.

The government, however, contends that the 1898 patents are invalid because the state never received any consideration for them as evidenced by the absence of any record of certificates of purchase issued by the State Treasurer to underlie these patents.

Attacks on patents have generally been restricted to either the sovereign that issued them or to a claimant who can show an equitable or legal title claim to the patented land *that existed prior to the issuance of the patent.* Smith v. Crandall, 118 La. 1052, 43 So. 699 (1907). In Albritton v. Shaw, 148 La. 427, 87 So. 32 (1921), the Louisiana Supreme Court established two prerequisites for an attack on a patent by an individual:

> "The two prerequisites of the right of an individual to attack the validity of a land patent are: First, that the individual making the attack had an equitable title or an inceptive right upon the land, *antedating* the issuance of the patent; *and,* second, that the attack is aimed at the jurisdiction or legal authority of the officers of the land department to issue the patent." 87 So. at 34 (emphasis supplied).

The government cannot meet these prerequisites as its title emanates from the patents issued in 1903, *subsequent* to the 1898 patents. But it does not attack Albritton v. Shaw, *supra*. Rather, to repeat, it takes the position that the 1898 patents are invalid because no consideration was ever paid to the state. It is argued that these patents being inherently invalid are not protected by the collateral attack rules set out in the above cases. In Smith v. Crandall, *supra*, the question of the legality of patents issued in 1881 was before the court. They were attacked on the ground that the patented lands were illegally purchased for scrip, instead of money, the court held that the "plaintiffs are without standing to maintain an action to annul such patents." Specifically, the court said:

> "The question of the validity of land patents is one between the state and the patentees, or their assigns. Plaintiffs had no inchoate rights of any kind in or to the lands granted at the date of the issuance of the patents. Plaintiffs, therefore, have no standing to question the validity of the patents on the ground of the alleged improper or illegal location of the scrip issued to John McEnery." 43 So. at 700.

This case is analogous to the instant one. The government does not have any rights that antedate the 1898 patents and, at first blush, it would appear that it is precluded from maintaining an attack on these patents. However, none of the cases cited above involved an attack on patents which derive their presumption

of validity from La.R.S. 13:3726 *et seq.*[22] This statute specifically provides, *inter alia*, that where a patent for land has been recorded in the office of the parish recorder where the land is situated, a copy of such record properly certified by the parish recorder shall

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[22]La.R.S. 13:3727 provides:

"Written acts recorded twenty-two years admissible

In every instance where the conveyance records in the clerk of court or of the parish recorder in any parish of the state show that any deed, conveyance, sale, lease, transfer, assignment, power of attorney, or other written act whatsoever, whether the instrument be notarial in form, be a private act, be attested or unattested, or whether the signature of the maker or makers thereof be acknowledged or unacknowledged or proven or unproven, shall have been recorded in the records for a period of not less than twenty-two years, it shall be presumed that the original instrument of which the record purports to be a copy bore the genuine signature of the maker or makers, and a copy of the recordation of any such instrument, certified by the clerk of court or any of his deputies, or by the parish recorder or any of his deputies, of the parish where the instrument in question was recorded, shall be received and admitted in evidence in the courts of Louisiana, without proof of signature of the maker or makers of the original act, and shall be deemed prima facie proof of the contents of the original instrument referred to in the certified copy."

La.R.S. 13:3730 provides:

"Same; acknowledgment or proof of authenticity not required

It shall be unnecessary for any ancient document, as defined in R.S. 13:3729, to be acknowledged or proven as provided by any act, statute or other law of the state in order for such ancient document to be admitted in evidence, and it shall be unnecessary to prove the execution of such document, the mere fact of such instrument having been recorded for a period of thirty years, as herein provided, being sufficient to establish a prima facie presumption of the execution and of the genuineness of such instrument."

be admissible in evidence and entitled to the same credit as the original of such instrument. The statute further provides that "the opposite party shall be allowed to disprove the genuineness of such original or registry, as the case may be." A rebuttable presumption of validity is created by the statute. However, it is not clear whether the party attempting to rebut this presumption is required to meet the limitations imposed by *Albritton, supra* and *Smith, supra.* This question is one not answered by Louisiana jurisprudence. It is not necessary, however, for this court to answer that question, for assuming that the government has the right to rebut the presumption of validity, it has failed to do so. The evidence offered by the government on the issue of the validity of the 1898 patents is meager and falls short of overcoming the statutory presumption. There has been no clear and convincing evidence to show that the patents are invalid. Absolutely no evidence was offered to disprove the genuineness of the Governor's signature as presumed under La.R.S. 13:3727. *Cf.* Watkins v. Zeigler, 147 So.2d 435 (La.App. 2d Cir. 1962). The government has offered proof of the fact that the patents of 1898 had erroneous specific numbers and book and page numbers of the patent record books in the Land Office, where they were supposedly recorded. Further, the government has shown that treasurer's certificate numbers upon which the 1898 patents were purportedly issued relate in fact to other parties, patents, and lands than those in question in this lawsuit. This argument, however, does not recognize that these patents as recorded in Plaquemines Parish set forth a description of the land patented, purport to transfer title and are regular on their face, having been signed by the Governor. Parentheti-

cally, it is incredible that the Recorder of Plaquemines Parish would record a patent that was not signed by the Governor and not regular on its face. The title conveyed by the patents cannot be rendered void simply because the numbers on them do not correspond with the records in the State Land Office. The patents were recorded in the parish where the lands are located and the failure of the Register properly to record or index the patents in the State Land Office cannot divest title, especially so, where as here, the heirs of an innocent transferee (Pierre Leon Buras) of the patentee (Octave Barrois) are attempting to assert title.[23]

In State v. Sweet Lake Land & Oil Co., 164 La. 240, 113 So. 833 (1927), the court said:

> "It is hardly necessary to consider the defendant's plea that the state had no right to assail collaterally, in a petitory action against an innocent transferee holding title from the patentee, the original patents, which are apparently valid. There seems to be no doubt about the proposition that a land patent, *if not void on its face,* is not only a conveyance of the title for the land, but is in the nature of an official declaration by that department of the govern-

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[23]The second special interrogatory propounded to the jury and its answer was:

> "2. At the time of the January 5, 1899 sale from Octave Barrois to Pierre Leon Buras was Pierre Leon Buras aware of any wrongdoing on the part of the Register of the State Land Office or was he otherwise aware of any question that could affect the validity of the 1898 patents? Please answer yes or no.
> Answer: 'No'."

ment in which the sale of the public lands is intrusted by law that all of the requirements preliminary to the issue of the patent were complied with, and that declaration, or presumption, is not open to rebuttal in an action at law against an innocent transferee of the title from the patentee." (emphasis supplied) (citations omitted) 113 So. at 838.

In St. Louis Smelting & Ref. Co. v. Kemp, 104 U.S. 636, 26 L.Ed. 875 (1882), the Court said:

"The execution and record of the patent are the final acts of the officers of the government for the transfer of its title, and as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, countersigned and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the government to which the alienation of the public lands, under the law, is intrusted, that all the requirements preliminary to its issue have been complied with. The presumptions thus attending it are not open to rebuttal in an action at law. It is this unassailable character which gives to it its chief, indeed, its only value, as a means of quieting its possessor in the enjoyment of the lands it embraces." 104 U.S. at 640-641.

Further, the United States Court of Appeals for the Fifth Circuit in La Terre Co., Inc. v. Billiot's Shell Island, 103 F.2d 53 (5th Cir. 1939), said:

> "When it is determined that an entryman or purchaser of public lands has done all that is required of him, and the land is subject to entry or sale, the issuance of the patent is a mere ministerial act, even though the ascertainment of the necessary prerequisites requires an administrative determination." 103 F.2d at 55.

These decisions give support to this court's view that the statutory prerequisites for issuance of patents in 1898 as provided in Act 75 of 1880 were complied with. Since there is no evidence of any wrongdoing on the Governor's part or of any forgery of his signature, there is a presumption that he performed his ministerial duty according to law and validly issued the 1898 patents. Any doubt raised by the government's evidence about these patents is not sufficient to overcome the statutory presumption that they were validly issued.

Accordingly, this court holds that the 1898 patents issued to Octave Barrois validly conveyed legal title of the disputed lands to him and that the recorded sale from Barrois to Buras in 1899 vested title in Pierre Leon Buras and his heirs.

EFFECT OF THE SUBSEQUENT SALE

Since this court holds that Barrois had title when he executed the 1899 deed to Buras, the question of whether the doctrine of after-acquired title would apply to this sale, which was made specifically excluding warranty, is moot.

PRESCRIPTION

The government has asserted a claim of ownership based on ten and/or thirty years acquisitive prescription. At the conclusion of the trial, the jury was adequately charged by the court on the elements of acquisitive prescription and the adverse possession needed to acquire by prescription. They answered all of the interrogatories that were propounded to them on these questions adversely to the government's claims and this court finds no reason to disturb their responses.

Finally, two other legal issues remain to be considered:

INVERSE CONDEMNATION

The government contends, in the alternative, that it has acquired the disputed lands by eminent domain under the principle set forth in United States v. Dow, 357 U.S. 17, 78 S.Ct. 1039, 2 L.Ed.2d 1109 (1958). In *Dow* the Court said the United States could take property pursuant to its power of eminent domain in one of two ways. It can institute condemnation proceedings under federal statutes providing authority for such taking, or it can take physical possession of property without authority of a court order. When the latter, a taking by physical seizure, is employed, there are no condemnation proceedings. In this situation, the property owner's remedy is a suit to recover just compensation under the Tucker Act, 28 U.S.C. §§ 1346(a)(2) and 1491. This physical seizure is the "inverse condemnation" relied on by the Government in this case. However, the Court in *Dow* also noted that:

> "[I]n both classes of 'taking' cases — condemnation and physical seizure — title to the property passes to the Government only when the owner receives compensation, see Albert Hanson Lumber Co. v. United States, 261 U.S. 581, 587, [43 S.Ct. 442, 67 L.Ed. 809,] or when the compensation is deposited into court pursuant to the Taking Act * * *." 357 U.S. at 21-22, 78 S.Ct. at 1044.

In the instant case, neither of these two events has occurred. The government has not paid the Buras heirs any compensation for the taking of the disputed lands nor has it deposited any money for this purpose in this court. Thus title to the property has not vested in the government and this contention must fall. *Cf.* United States v. Gallas, 269 F.Supp. 141, 150 (D.Md. 1967).

CLAIM OF THE INTERVENORS

Intervenors are descendants of one Amelie Elodie Buras. These parties contend that they are legal heirs of Pierre Leon Buras and are necessary parties to this suit. The Buras heirs opposed this intervention on the grounds that there is no genuine issue of material fact that Amelie Elodie Buras is not a legitimate child of Pierre Leon Buras and as a matter of law, her heirs should be dismissed from this lawsuit. In the intervenors' original petition they alleged that Amelie Elodie was the daughter of Pierre Leon Buras and Eleonore Buras, born prior to their marriage and legitimated pursuant to article 198 of the Louisiana Civil Code.

That article provides for legitimation of children born out of marriage by the subsequent marriage of their father and mother, whenever both parents have acknowledged them as their children.[24] However, as a result of pre-trial discovery, it was determined that Eleonore Buras, the alleged mother of Amelie Elodie, was only eight years older than Amelie. Subsequently, counsel for the intervenors abandoned their argument that Amelie was legitimated pursuant to Article 198, admitting that Eleonore Buras was not Amelie Elodie's mother. Now, they contend that her mother was some unknown woman who was never married to her father, Pierre Leon Buras. It is further asserted that Amelie Elodie was legitimated pursuant to article 198, ad- of Act 37 of 1831 (page 86 of the acts of that year) which were in force in 1868 when the marriage certificate was executed.[25] Counsel for the intervenors

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[24]Louisiana Civil Code article 198 provides:

"Legitimation by subsequent marriage of parents

Art. 198. Children born out of marriage, except those who are born from an incestuous connection, are legitimated by the subsequent marriage of their father and mother, whenever the latter have formally or informally acknowledged them for their children, either before or after the marriage." (As amended Acts 1944, No. 50; Acts 1948, No. 482, § 1).

[25]Louisiana Civil Code article 200 and La.R.S. 9:391 are derived from Act 37 of 1831. They provide respectively:

"Legitimation by notarial act

Art. 200. A natural father or mother shall have the power to legitimate his or her natural children by an act passed before a notary and two witnesses, declaring that it is the intention of the parent making the declaration to legitimate such child or children. But only those natural children can be legitimated who are the offspring of parents who, at the time of conception, could have contracted marriage. Nor can a parent legitimate his or her natural offspring in the

and the Buras heirs have stipulated to the English translation of the marriage certificate which states:

Pierre Leon Buras and Eleonore Buras Feb. 25

"February 25, 1868, I, the undersigned parish priest of Notre Dame de Bon Port, after having obtained the dispensation of the second degree of consanguinity and accorded that of a bann, have blessed the marriage of Pierre Leon Buras, legitimate son of Jean Pierre Buras and of Amelie Buras, born and living in this parish, on the one part, and of Eleonore Buras, legitimate daughter of Cyprien Buras and of Melozie Buras, born and living in this parish, on the other part.

The parties having obtained the license of the judge and recognized and adopted as legitimate his daughter Amelie Buras.

Cyprien Buras
Pierre Leon Buras
Hippolyte Buras
Jean Pierre Buras
Pierre Leon Buras
/s/ Parish Priest"

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manner prescribed in this article, when there exists on the part of such parent legitimate ascendants or descendants."

"§ 391. Legitimation of natural children

Natural fathers and mothers shall have power to legitimate their natural children, by acts declaratory of their intentions, made before a notary public and two witnesses; provided there existed at the time of the conception of such children, no other legal impediments to the inter-marriage of their natural father and mother except those resulting from color or the institution of slavery."

The pertinent statute, Act 37 of 1831, which was in effect in 1868 provided:

"Sect. 1.
Be it enacted by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened, That so much of the article two hundred and seventeen, of the Civil Code, as abolishes all other modes of legitimation except that by marriage, be, and the same is hereby repealed, and that law seventh, title fifteenth, of the fourth partidas, which was repealed by said article of the Code, be and the same is hereby received; and that natural fathers or mothers shall have the power to legitimate their natural children, by acts declaratory of their intention, *made before a notary and two witnesses:* Provided, That nothing herein contained, shall be so construed as to enable a white parent to legitimate a colored child, nor to prevent a free person of color to legitimate his colored children: Provided, the natural children are the issue of parents who might, at the time of conception, have contracted marriage; and Provided, That there do not exist, on the parent legitimating his natural offspring, ascendants or legitimate descendants

Sect. 2. Be it further enacted, That the article three thousand three hundred and nineteen, of

the Civil Code, be, and the same is hereby repealed.

Sect. 3. Be it further enacted, That the provisions of this act shall be in force from and after its passage." (Emphasis added.)

The intervenors contend that Pierre Leon Buras fulfilled the requirements for legitimation under this act by having the marriage certificate executed. They admit that the certificate was not signed by a notary but contend that the signature of the parish priest is sufficient. Specifically, they argue that the requirement that an act be passed before a notary public is only directory and not mandatory. As authority for this proposition, the case of Davenport v. Davenport, 116 La. 1009, 41 So. 240 (1906), is relied on. In that case, an act of legitimation was executed by a notary public whose commission had lapsed. The court held that even if, at the time the act was executed he, the notary, was not a notary de jure, "if a person holds a commission as one [a notary public], and acts as one, and has the reputation to be one, he is clearly one under the principle of the law of officers de facto." 41 So. at 241. This doctrine of de facto notary was also applied in Succession of Segura, 134 La. 84, 63 So. 640 (1913). Yet, neither in the *Davenport* case nor in any Louisiana jurisprudence has there ever been an indication by any Louisiana court that the requirement of Civil Code article 200 (which is derived from Act 37 of 1831) that an act be passed before a notary is merely directory. The Louisiana Supreme Court has said that the methods of legitimation provided for in Civil Code articles 198 and 200 and in La.R.S. 9:391 are exclusive.

Succession of Tyson, 186 La. 516, 172 So. 772 (1937). A notarial act is the only way a parent can legitimate his illegitimate child if he does not marry the other parent, since the purported act of legitimation in this case was not executed by a notary public, it does not meet the requirements of Louisiana law and it must be found invalid.

As an alternative argument, the intervenors contend that the Louisiana laws of successions which allow legitimate children of a descendant to inherit in preference to his illegitimate children is unconstitutional as it violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. In support of this argument they rely on the United States Supreme Court cases of Levy v. Louisiana, 391 U.S. 68, 88 S.Ct. 1509, 20 L.Ed.2d 436 (1968), and Glona v. American Guarantee & Liability Insurance Co., 391 U.S. 78, 88 S.Ct. 1515, 20 L.Ed.2d 441 (1968).[26] The *Levy* case held that to deny illegitimate children damages for the wrongful death of their parents solely because they were illegitimate was in violation of the Equal Protection Clause of the Fourteenth Amendment. However, the purpose of a wrongful death statute and that of the laws of succession are not the same. One allows tort recovery by creating a cause of action. The other provides for the orderly distribution of a decedent's estate. It does not follow that the distinction between legitimates and illegitimates for purposes of inheritance is unconstitutional, merely because illegitimates

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[26]The *Glona* decision allowed a parent of an illegitimate child to recover for that child's wrongful death. The court's rationale was the same as used in *Levy*. For this reason, the two cases are treated as one in this opinion.

cannot constitutionally be denied the right to recover damages in a tort action for the death of a parent. See Strahan v. Strahan, 304 F.Supp. 40 (W.D.La. 1969),[27] and Succession of Vincent, 229 So.2d 449 (La. App. 3d Cir. 1969), holding that Louisiana laws of succesion are not unconstitutional under the *Levy* decision. But see Estate of Jensen, 162 N.W.2d 861 (N.Dak. 1968), and R____ v. R____ ,431 S.W.2d 152 (Mo. 1968).[28]

This court, however, finds it unnecessary to decide the question of whether or not *Levy* requires invalidation of Louisiana's succession laws as they affect illegitimates. Under Louisiana law, the capacity or incapacity of an heir is determined at the moment of the opening of a succession. La. Civil Code art. 950; Murdock v. Potter, 155 La. 145, 99 So. 18 (1924); and a succession is opened by the death of the person who is to be succeeded. La. Civil Code arts. 934, 978. Pierre Leon Buras died in 1908, and to apply the *Levy* rationale to his succession now would be giving that decision retroactive effect. This court holds that if the *Levy* case is applicable to succession law, in the light of the facts of this case, it should be given prospective effect only.

The Constitution neither requires nor prohibits the retroactive application of a ruling. Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1964).

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[27] *Strahan v. Strahan* is now pending in the United States Court of Appeals for the Fifth Circuit Appeal No. 29052.

[28] Louisiana, by virtue of its civil law ancestry, distributes a decedent's estate in accordance with its unique forced heirship method. La.Civil Code art. 1493 (1870). This distinguishes its inheritance laws from those of the other 49 states.

In *Linkletter*, a criminal case, the Court stated "the accepted rule today is that in appropriate cases the Court may in the interest of justice make the rule prospective." 381 U.S. at 628, 85 S.Ct. at 1737. Further, it said that no distinction is drawn between civil and criminal litigation in deciding whether to apply a ruling retrospectively or prospectively, and in support of this statement, cited the cases of United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 2 L.Ed. 49 (1801), and Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 60 S.Ct. 317, 84 L.Ed. 329 (1940). In *Chicot, supra*, the Court stated:

> "The effect of the subsequent ruling as to invalidity may have to be considered in various aspects, — with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, or prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination." 308 U.S. at 374, 60 S.Ct. at 319.

Assuming that the Supreme Court would apply *Levy* to Louisiana succession law, it is doubtful that the Court would make such application effective retroactively for to do so would make "confusion worse confounded." This is particularly true in a case such as this where the ancestor died more than sixty years ago. As stated by Judge Dawkins in *Strahan v. Strahan, supra*:

"There simply must be a method for prompt and final definitive determination of valid ownership of real property left by a decedent. Louisiana feels that the proper way to insure this is to know who the claimants to a decedent's property are and to recognize the legally instituted claimants as owners shortly after a succession is opened. To hold that an illegitimate child may one day — perhaps many years later — come along and assert an interest in adjudicated property would devastate the orderly transmission of immovable property. 'All titles would be insecure, and the intercourse between man and man would be very seriously obstructed, if this principle be overturned.' Fletcher v. Peck, 10 U.S. 87, 6 Cranch. 87, 133, 3 L.Ed. 162 (1810)." 304 F.Supp. at 43.

Accordingly, judgment must be entered dismissing the intervention.

The defendant Buras heirs are entitled to a judgment consistent with this opinion and with the jury's answers to the interrogatories.

APPENDIX C

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant-
Cross Appellee,

and

CHEVRON OIL COMPANY, et al.,
Additional Defendants-Appellants-
Cross Appellees,

versus

LEON BURAS, JR., et al.,
Defendants-Appellees-
Cross Appellants,

versus

PHILIBERT BURAS et al.,
Intervenors-Appellants.

No. 31115

United States Court of Appeals,
Fifth Circuit.
March 23, 1972.

TUTTLE, Circuit Judge:

The dispute in this case centers around certain lands located in Plaquemines Parish, Louisiana. Essential-

ly, this court is asked to decide between claimants who claim to take under two different chains of title. Because one of these chains leads directly to the United States Government, which is presently both a possessor and a lessor of the lands in dispute, what, at first blush, seems clearly a problem for the state courts, finds itself before a Federal tribunal. We must, however, apply Louisiana law in resolving this controversy. Having done so, we conclude that the judgment of the trial court, 332 F.Supp. 1017, should be reversed.

This suit had its beginnings in the state courts. On November 18, 1954, the heirs or Pierre Leon Buras (hereinafter referred to as the Buras heirs) brought suit in state court asserting title to the lands here in dispute. They also sought eviction of certain mineral lessees, who had as their lessor, as stated above, the United States Government. The United States, however, then brought suit pursuant to 28 U.S.C. § 1345,[1] attempting to quiet its title and permanently enjoin the prosecution of the state court suit. To insure that all persons asserting any right or claim to the property would be before the court, the Government made its mineral lessees, Allen L. Lobrano and the heirs of Frank J. Lobrano, parties defendant (here, appellants and cross-appellants). Similarly, they also joined Chevron Oil Company and Leiter Minerals. Before

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[1]28 U.S.C. § 1345 states:

> Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

dealing with the arguments raised by these parties, we briefly set forth the pertinent facts involved.

I. FACTS

In 1894 a hunter and trapper by the name of Octave Barrois applied to the State of Louisiana for entry to certain marsh lands in Plaquemines Parish. It is unlikely that Barrois had anything more in mind than ultimately acquiring an area in which he could pursue his trade. Little did he know that in 1950-51 eight producing oil wells were to come into existence.

Barrois paid a sum of money (12 1/2 cents an acre) to the Register of the State Land Office, John Lanier, who thereupon issued a certificate to Barrois setting forth the land description, area, and amount paid in connection with this application. Barrois pursued this application and finally received allegedly formal patents from the State of Louisiana in 1898. Both the certificate issued in 1894 as well as the 1898 patents were recorded in the official Parish conveyance records in Plaquemines Parish shortly after they were received. Soon after receiving the patents Barrois executed a deed to his brother-in-law, Pierre Leon Buras, dated January 5, 1899, putting in Buras' name the lands in dispute. In this deed, Barrois gave an accounting of 5,465 acres of land which he had sought to acquire, and purportedly had acquired, under these State patents. He conveyed 2,355 acres to Pierre Leon Buras for the same price per acre that Barrois paid to the State. The parties struck out the warranty clause in

the printed form of the deed, however, changing it by handwriting to read "without warranty."

At this point in the narrative, it is important to emphasize that one of the central issues in this case concerns the validity of these 1898 patents. It is thus significant to note that though these State patents were recorded at the *Parish* level, they were not recorded in the State Land Office. Moreover, the money paid for these patents was, apparently, never deposited in the State Treasury. Indeed, the State Official to whom payment was made — Lanier — was not only the wrong official to deal with, as we read the statutes then in effect, but was subsequently revealed to be a rogue of the highest order. The record reveals that he was involved in a number of swindles and illicit schemes which became public knowledge only after he committed suicide in 1900.

Once Lanier's defalcations had been revealed, however, Barrois, who had been in touch with the new Register, initiated a second attempt to purchase the land in dispute. He thus paid the same purchase price once again — this time to the State Treasurer, the proper State Official — and received a new set of patents in 1903. These were duly recorded in accordance with Act 75 of 1880 in the State Land Office. Shortly thereafter, Barrois conveyed the same lands he had previously conveyed to Pierre Leon Buras to Pierre Leon's son-in-law, Augustin Buras. Appellees speculate that Pierre Leon had perhaps been offered an opportunity to, but had refused to pay a second time for the same lands and that Barrois had paid the sec-

ond purchase price (which was the same as the first) and, so the assumption by appellants goes, he thus assumed that he obtained the right to reconvey these lands. Whatever the motivation behind this second transaction, a second chain of title resulted, ultimately descending to the United States. It is the task of this court to determine which of the divergent paths leads to the true owner of this land.

In so doing, we note one additional fact. Though Pierre Leon Buras paid the taxes on these lands from 1899-1902, it is without dispute that in 1903, the year Barrois paid for the lands the second time and received the patents, neither Pierre Leon nor his successors ever paid any more taxes on the lands. However, Barrois then resumed payment of the taxes. From the time he conveyed to Augustin Buras to the present, the taxes have been paid by Augustin Buras' succeeding transferees. Moreover, we think it only fair to note that, though the Buras heirs made some inquiries as to the ownership of the lands, no contest in earnest began until 1954 — over 50 years after their antecedents had stopped paying taxes and after the sale by Barrois to Augustin. This also was just three years after the land began producing oil. While such facts are of doubtful significance in light of the disposition we make of this case, we are not troubled with the thought that the result we feel Louisiana law compels us to reach is, in any way, inequitable or unduly harsh.

II. THE VALIDITY OF THE 1898 PATENTS

We begin with a consideration of the validity of the 1898 patents. We are met at the outset, however, with the argument that patents which are valid on their face are subject to attack only under certain strictly limited circumstances. The trial court noted that the Louisiana Supreme Court, in Albritton v. Shaw, 148 La. 427, 87 So. 32, 34 (1921) established two prerequisites for such an attack:

> "The two prerequisites of the right of an individual to attack the validity of a land patent are: first, that the individual making the attack had an equitable title or an inceptive right upon the land, *antedating* the insuance of the patent; and second, that the attack is aimed at the jurisdiction or legal authority of the officers of the land department to issue the patent" See, also, Smith v. Crandell, 118 La. 1052, 43 So. 699 (1907) (emphasis added).

We do not feel that the Albritton rationale controls this case. As the trial court itself noted in this regard:

> "... none of the cases cited above involved an attack on patents which derive their presumption of validity from La.R.S. 13:3726 et seq."

And indeed, in addition to distinguishing the Albritton case, this comment by the trial court was undoubtedly made because there were no original patents before the court. They had been lost, and in order to prove them.

it was necessary for the Buras heirs to follow the procedure provided for in La.R.S. 13:3726 et seq., which reads as follows:

> Where a patent for land, or the certificate of the register, or the receipt of the receiver, whether issued, or to be issued, by the officers of the State of Louisiana, or the general government has been, or may hereafter be *recorded in the office of the recorder of the parish in which the land may be situated,* (which is what had been done here) a copy of such record properly certified by the parish recorder, shall be admissible in evidence in all causes pending before any of the courts, in the same manner, and shall be entitled to the same credit as the original of such instruments, or as exemplification thereof; provided, the party proposing to use such evidence shall make affidavit that the original of such patent or certificate is not in his possession or under his control. *However, the opposite party shall be allowed to disprove the genuineness of such original or registry, as the case may be.* (emphasis added)

The only evidence of the 1898 patents offered by the Buras claimants consisted of copies of pages taken from the handwritten conveyance records of Plaquemines Parish for 1899 purporting to set forth the "patents." Though, as the statute above states these copies are admissible into evidence, an attack on the *genuineness* of that which they purport to be copies of is expressly provided for. Surely, this in itself is a signifi-

cant distinguishing feature of this case from that of the Albritton variety.

Moreover, this case differs in another respect. Though it is true that the Government does not have any rights that antedate the 1898 patents, they are suing on the basis of patents issued in complete compliance with Louisiana law. Further, unlike the plaintiff in Albritton, the Government, its predecessors or lessees have been in actual possession of the lands in dispute ever since the issuance of the patents on which they rely. The 1898 patents are asserted *as a defense* to their action to quiet title to land they have occupied for over 50 years and as to which they had patents which are valid on their face.[2] Surely, in this posture of the case, the 1898 patents are subject to attack.

Having determined that the validity of the 1898 patents is fair game for the Government, we consider whether they stand or fall on their own merits. In so doing, we must answer two questions: (1) on whom is the burden of proof?; (2) has that burden been met?

The answer to the first question is readily apparent. As the trial court noted:

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[2]It is thus the United States which comes into court and makes out its prima facie case by presenting the apparently, valid patents of 1903, coupled with over fifty years of enjoyment and payment of taxes. It is the appellees who must attack the validity of the 1903 patents. This they attempt to do by showing the existence of the 1898 patents by introducing copies of the originals.

> Since the Buras heirs have asserted title to land which is in the possession of the United States, they have the burden of proving their title. Manhattan Land and Fruit Company v. Buras, 43 F.Supp. 361, 365 (E.D. La. 1942). Cf. Arent v. Hunter, 171 La. 1059, 133 So. 157, 162-163 (1931).

The answer to the second question, however, is much more difficult to determine. Again, as the trial court noted:

> They (the Buras heirs) have attempted to sustain this burden by introducing certified copies of the 1898 patents issued to Octave Barrois as they were recorded and indexed in the conveyance records of Plaquemines Parish and the deed executed by Barrois to Pierre Leon Buras, the Buras heirs' ancestor, dated January 5, 1899, which deed purported to convey to Pierre Leon Buras, without warranty, all of the lands here in dispute. The heirs also introduced the record from Plaquemines Parish of a "statement of costs" issued by Register Lanier to Octave Barrois in 1894, which shows that Barrois applied to purchase the disputed lands.

On the basis of this as well as the record before us as a whole, we conclude that the Buras heirs have simply failed to meet their burden of proof.

III. BURDEN OF PROOF

We cannot accept, even arguendo, the trial court's conclusion that the 1898 patents are presumed to be valid since they have not been judicially attacked for over fifty years. As stated above, the statute which allows the certified copies of the entry of the 1898 patents into the parish records expressly allows the originals of such copies to be subjected to any proper questioning regarding their genuineness. Thus, we feel the appellees must carry their burden without the benefit of any presumption. Since the Government contends and appellees virtually concede that regardless of where one must record his patents, the requirements for obtaining a valid patent, as stated by Act 75 of 1880, simply were not followed, we do not feel the 1898 patents can be upheld.

This Act, which both sides agree governed when the 1898 patents were issued, specifically requires that the Register keep official accounts and records of the sale of State lands and, on the sale of such lands, he is to describe them in an order to the Treasurer of the State.[3]

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[3]Sec. 3 *Be it further enacted*, etc., that it shall be the duty of the register to keep accounts of the sales of lands donated to the State, in well bound books, with the number of the certificate issued, therefore, setting forth the section, parts of sections, township and range, district and parish, to whom and when sold, and for what price, and shall cause to be marked on the official plats or maps on file in his office the number of certificate, which books and maps shall be preserved as official records.

Moreover, it is the Treasurer who is to receive the money for these lands and, as receiver, it is this official who is to deliver to the purchaser or his agent a receipt for the payment of the money for the lands.[4] In no case is the Register to make any entry of the sale of such lands in the official records *until the receipt of the Treasurer had been submitted and filed in his office.*[5]

Finally, it was the duty of the Governor to issue patents for all lands sold *only on presentation of a Treasurer's receipt showing payment to the state* for the lands in question.[6]

As appellants note, the undisputed evidence reveals not only that the official records in the State Land Office contain *no account of any 1898 sale or "patents"*

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[4]Sec. 4. *Be it further enacted*, etc. that all money arising from the sale of warrants on public land *shall be paid by the purchaser to the State Treasurer*, on the warrant of the Auditor of Public Accounts, whose duty it shall be to warrant at once on the Treasurer of the State to receive said money within forty-eight hours after the issuance of the same by the Auditor. (emphasis added)

[5]Sec. 5. *Be it further enacted, etc.*, that the Register of the State Land Office shall, on the sale of lands or warrants, describe the same in his order on the Treasurer of the State to receive the money for said lands, and in no case shall an entry be made upon the books, maps or other official record until the receipt of the Treasurer also describing the land or warrants, has been submitted and filed in his office; a violation of this section shall be deemed a felony, and upon conviction the party offending shall pay a fine of five thousand dollars, and be imprisoned for a term not exceeding ten nor less than two years.

[6]Sec. 14. *Be it further enacted, etc.*, that it shall be the duty of the Governor when applied to, to issue patents for all lands, sold, on presentation of the Treasurer's receipt and for lands located by warrants, whenever he shall be satisfied that the same have been legally sold and located.

to Barrois, but also that *no money was paid to or received by the State Treasurer* for any such patents, and that the *State Treasurer never issued to Barrois or to anyone else, a receipt or certificate of purchase* showing the payment of money for the 1898 patents. In the face of this, we feel appellees could not possibly carry their burden of proof. Since the 1898 patents were not issued properly in the first instance, title did not vest in Barrois. He thus could not convey to Pierre Leon that which he did not have.

Appellees, however, argue that the 1880 Act does not require that the money be paid only the State Treasurer. We feel that this statute is clear on its face. They also contend, however, that Lanier was an agent of the State and as such, his failure to pay Barrois' money to the Treasurer cannot be held against them. Moreover, as the trial court noted:

> The patents were recorded in the parish where the lands are located and the failure of the Register properly to record or index the patents in the State Land Office cannot *divest* title, especially so, where as here, the heirs of innocent transferee (Pierre Leon Buras) of the patentee (Octave Barrois) are attempting to assert title.

In short, it is argued that neither the failure to pay the proper official nor that official's failure to record the patents at the State Capitol is enough to *divest* title.

To state, as the trial court has, that title "cannot be divested" implies that, at some point in time, it had become vested. Indeed, this is the underlying issue of this case. We feel that failure to comply with the explicit terms of the state statute governing the procedures for the sale of State lands is fatal to any claim that the patent is valid. Moreover, recording at the parish level, which, as the trial court itself noted, it was not necessary to do so, does nothing by way of actually vesting title in Barrois. Since we find that the only manner in which title could have vested was by complying with Act 75, the opportunity to record at the parish level was nothing more than a way of perpetuating one's evidence of title. Even this opportunity is afforded only by R.S. 13:3726, which we have quoted above. However, assuming the public records statute providing for recordation of deeds from others than the state is to be construed as comprehending recordation of State patents,[7] recording under this

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[7]As the trial court noted:

> The public records doctrine in Louisiana emanates from the decisions for recordation contained in the Civil Code, Articles 2251-66.
>
> Article 2264 provides:
>
> > "Notarial acts concerning immovables, effective date as against third persons
> >
> > 2264. No notarial act concerning immovable property shall have any effect against third persons, until the same shall have been deposited in the office of the parish recorder, or register of conveyances of the parish where such immovable property is situated."
>
> Article 2265 provides:
>
> > "Recordation of judicial sales, marriage contracts and judgments affecting immovables
> >
> > 2265. All sales of immovable property made by any sheriff or other officers, by virtue of any execution or

statute could not make valid what was invalid ab initio.

Indeed, the Supreme Court in dealing with lands granted by the United States Government had this to say:

> "... in all Nations, as far as we know, where grants of the property of the government or of the Crown are made by written instruments, provision is made for a record of these instruments in some public government office. ...
>
> * * * *
>
> The Acts of Congress provide for the record of all patents for land in an office, and in books kept for that purpose. An officer, called the Recorder, is appointed by law to make and to keep these records. This officer is required to

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other order of court; all marriage contracts made within this State, tending in any wise to convey, transfer, assure or affect the estates of the parties, or being only intended to ascertain the dotal rights of the wife, or that her marriage portion is liable to some reserves, or stipulated to be paraphernal or extradotal property; and all final judgments affecting immovable property shall be recorded in the parish where the immovable property is situated."

Article 2266 provides:

"Effectiveness of unrecorded acts affecting immovables; effect of subsequent recordation

2266. All sales, contracts and judgments affecting immovable property, which shall not be so recorded, shall be utterly null and void, except between the parties thereto. The recording may be made at any time, but shall only affect third persons from the time of the recording.

The recording shall have effect from the time when the act is deposited in the proper office, and indorsed by the proper officer."

> record every patent before it is issued, and to countersign the instrument to be delivered to the grantee. This, then, is the final record of the transaction, the legally appointed act which completes what Sir William Blackstone calls title by record; and *when this is done, the grantee is invested with that title.* United States v. Schurz, 102 U.S. 378, 402-403, 26 L.Ed. 167 (1880)."

We adopt a similar approach in holding that the grantee, Barrois, never was invested with title due to his failure to comply with the governing Act in force at that time.

There are important reasons for requiring strict adherence to such statutes as are involved in this case. In addition to ensuring the orderly administration of such governmental transactions, the procedural protections built into these statutes guard against careless, fraudulent or unscrupulous governmental officials. Requiring, for example, that money be paid to a particular individual who must give a receipt and be held accountable for all monies received is for the protection of the public at large as well as the individual purchaser involved. Of course, had Act 75 been complied with in the case at bar, what is now being complained of would never have come to pass.[8]

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[8]Indeed, the seriousness which the State of Louisiana attached to the precise requirements relating to payment to the Treasurer is indicated by the criminal sanctions to be involved for failure to comply. Such violation was a felony punishable by a $5,000 fine and imprisonment for a maximum of 10 years. See quoted sections in footnote 4, supra.

To hold that in failing to follow the statute, the purchaser, in effect, was able to designate the unscrupulous Register as an agent of the State rather than an agent of the purchaser, himself, would, we feel, undermine the purpose and significantly frustrate the salutary effects of the Act involved. See generally, Matthews v. Zane, 20 U.S. (7 Wheat.) 164, 205, 5 L.Ed. 425 (1822); Polk's Lessee v. Wendal, 13 U.S. (9 Cranch) 87, 3 L.Ed. 665 (1815); Saltenberry v. Loucks, 8 La. Ann. 95 (1853); Broussard v. Broussard, 43 La.Ann. 921, 9 So. 910 (1891); Hood v. Martin, 11 La.Ann. 552 (1856).

In short, we do not feel that appellees have proved the validity of the 1898 patents. Though they contend that they are valid on their face, we note that there is some question as to whether the signature on those patents was that of the Governor. Even if we assume the patents were validly signed by the Governor, an issue which the jury could not resolve,[9] we do not feel

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[9]The trial court submitted the following interrogatory to the jury:

> Did the Governor of Louisiana sign the 1898 patents to Octave Barrois in this case?

The jury could not agree on the answer. The trial judge ruled that this was a question of law and resolved the issue by holding, in effect, that the Governor did sign these patents.

In so doing, the trial court was apparently working under the assumption that there is a presumption that the Governor has performed his ministerial duty. Indeed, the court cited the following from a Fifth Circuit case:

> When it is determined that an entryman or purchaser of public lands *has done all that is required of him*, the land is subject to entry or sale, the issuance of the patent is a mere ministerial act even though the ascertainment of the necessary prerequisites requires an administrative determination Laterre Co., Inc.

that that alone proves the validity of these patents. If his signature was affixed without benefit of the Treasurer's receipt and without any entry of this transaction in the State record books, it was not in compliance with the governing law and therefore could not cure the defects which existed in these patents.

IV. THE DOCTRINE OF AFTER-ACQUIRED TITLE

Appellees argue, in the alternative, that even if we find the 1898 patents to be invalid, which we do, they are entitled to take under the 1903 patents by reason of the doctrine of after-acquired title. The argument is that if Barrois executed a deed to Pierre Leon Buras to lands which he did not own, as we have held, then when he later acquired them, title would pass under the earlier deed. This Court's en banc decision in Butler v. Bazemore, 303 F.2d 188 (5th Cir. 1962) controls this issue. In that opinion this Court stated that:

> "The doctrine of after-acquired title applies only to a vendee holding by a *warranty deed* ..." Id. at 194 (emphasis added)

It is beyond dispute that the conveyance from Octave Barrois to Pierre Leon Buras expressly excluded warranty. As appellants point out, the instrument was executed on a printed form of deed which stated "with

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v. Billiotts Shell Island, 103 F.2d 53 (5th Cir. 1939) (emphasis added).

We do not disagree with this proposition. What we hold, however, is that prior to issuance of the patent it has not been adequately proved that 'all that is required" of the purchaser had been done.

full and general warranty of title." The parties, however, struck out "full and general" and by interlineation changed the word "with" to "without". This express exclusion, we feel, brings this case within the ambit of Butler.

Appellees, however, contend that the Butler case simply held that in a sale which was silent as to warranty, a warranty will be implied pursuant to Civil Code Article 2501. The Court's generalization that the parties could have avoided that result by an "express exclusion of warranty" was dictum. They note that Article 2505 of the Civil Code provides:

> Even in case of stipulation of no warranty, the seller, in case of eviction, is liable to a restitution of the price, unless the buyer was aware, at the time of the sale, of the danger of the eviction of the price, unless the buyer was aware,

On the basis of this section, they argue that the Court must determine whether or not the purchaser was aware of the danger of eviction. If not, as they note in the case at bar, warranty still exists as to the return of the purchase price and, they contend, after acquired title would apply.

We disagree. To say that even without warranty, an unsuspecting vendee may be entitled to a return of his purchase price is a far cry from saying the vendee is entitled to title as well. Once a vendee agreed to accept a no warranty deed, he accepts the risks that go with it. We feel the clear implication of Baze-

more v. Butler is that after-acquired title does not ap
ply when warranty is expressly excluded.

Because of the disposition we make of this case, i
is not necessary to reach the issues raised by the in
tervenors. The judgment of the trial court is reverse
and the case is remanded to the trial court for entr
of judgment quieting title to these lands in the Unite
States.

Reversed with directions.

* * *

APPENDIX D

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING AND REHEARING EN BANC (INCLUDING DISSENTING AND SPECIALLY CONCURRING OPINIONS)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 31115

UNITED STATES OF AMERICA,
Plaintiff-Appellant-
Cross Appellee,

and

CHEVRON OIL COMPANY, ALLEN L. LOBRANO, MRS. ETHEL M. FONTENELLE LOBRANO, ROBERT LEO LOBRANO AND KAREN KATHERINE LOBRANO,
Additional Defendants-Appellants-
Cross Appellees,

versus

LEON BURAS, JR., ET AL,
Defendants (1-26)-Appellees-
Cross Appellants,

versus

PHILIBERT BURAS, ET AL,
Intervenors-Appellants.

Appeals from the United States District Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC
(Opinion March 23, 1972, 5th Cir., 1972, ____ F.2d ____).

(December 26, 1972)

Before TUTTLE, GEWIN and GOLDBERG, Circuit Judges.

PER CURIAM: The Petition for Rehearing and motion to file supplementary petition for rehearing are hereby DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for rehearing En Banc is also DENIED.

Before BROWN, Chief Judge, TUTTLE, WISDOM,* GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, INGRAHAM and RONEY, Circuit Judges.

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*Judge Wisdom did not participate in this cause.

BROWN, Chief Judge, dissenting:

With all due deference to the conscientious and scholarly approach of the panel to the intricate analysis of Louisiana land law required by this decision, I respectfully dissent from the Court's denial of rehearing en banc.

I do not begin to offer even a faint whisper of a suggestion of possible criticism of the panel's decision on the *merits* of the competing claims. Indeed, it is that the *merits* are inescapably shrouded in ancient history, Louisiana practices in the administration of state land patent grants, and the intricacies of Louisiana law and procedure, that makes it imperative that these difficult questions be certified to the Supreme Court of Louisiana for a determination which will have both authoritativeness and finality. Since the panel acted without so much as mentioning either the strong showing for or the present statutory availability of such certification, the only way for this to be accomplished at this level is for us to grant rehearing en banc and then order such certification.

Although I avoid the merits as such, they are important in my approach. To reach its decision that certain patents granted by the State of Louisiana in 1989 to Octave Barrois were invalid under the then applicable Louisiana law, the panel had to first leap the purposefully erected hurdle of *Albritton v. Shaw*, 1921, 148 La. 427, 87 So. 32 — a Louisiana Supreme Court opinion of long and unquestioned validity. To propel it over this formidable bulwark the panel had to reach a now

severely attacked construction of a Louisiana evidentiary statute. Having surmounted the procedural obstacles in its course, the Court then had to proceed to explicate the now-ancient Louisiana land patent law and to delineate the scope of the Louisiana version of the cryptic doctrine of after-acquired title.

Given the complicated and unique nature of these substantive and procedural questions of Louisiana land law, the panel's decision could have been no more than a guess — albeit an educated one. I, for one, quickly concede my inability to accurately expound on the occult peculiarities of Louisiana land law, as witnessed by my self-confessing concurrence in the 1960 en banc opinion, *Butler v. Bazemore*, 5 Cir., 1962, 303 F.2d 188, overruling my earlier 1957 effort for the panel in *Bazemore v. Whittington*, 5 Cir., 1957, 245 F.2d 943.

Of course I recognize that under Article III we do have the duty to decide even the most abstruse matters — even in diversity cases where there is no readily available means to secure authoritative state decisions except in the really important rare cases.[1] But where there is a method and the case is vital to state

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[1]Although as note 9, *infra*, reflects, we have frequently used the Florida certification procedure with great success, the device is reserved for important cases involving Florida public policy. Literally hundreds of run-of-the-mill Florida diversity cases have routinely been handled by panels of the Court.

Beleaguered as we are by an exponential docket increase, we have not allowed certification to become an escape or abdication.

interests, it is the part of judicial statesmanship[2] to exploit such procedures fully.

The true pith of this litigation concerns the legal allocation of one of Louisiana's most treasured natural resources — her gas and oil. The State of Louisiana, not just private litigants, has repeatedly sounded the state policy of exploiting and preserving her oil and gas reserves,[3] and she continues to do so.[4]

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[2]In some ways, this same policy is reflected in our deference toward the views of the District Judge steeped as he is in local law, lore and legend. Judge Gewin recently recognized this:

> Judge Borah was a former Louisiana practitioner as was the district judge in this case before being appointed to a federal district judgeship in that state. Although we certainly do not base our decision in this case solely upon the expertise of other judges merely because complex questions of state law are involved, their personal acquaintance with the state law is a factor which weighs in favor of their conclusion as to state law. Such consideration is particularly appropriate where as here the state law is unclear and ambiguous

Tardan v. Chevron Oil Co., 5 Cir., 1972, ____ F.2d ____, ____ [No. 71-3027, July 5, 1972 at 4].

This is especially significant here where the panel comprising no Louisiana trained Judges rejects the conclusions of Judge Christenberry, a long-time Louisiana practitioner and federal trial judge.

[3]Its importance was recognized by the Supreme Court in FPC v. Louisiana Power and Light Co., 1972, 406 U.S. 621, 92 S.Ct. ____, 32 L.Ed.2d 369, by its quotation from the state's amicus brief:

> "12. The conflict between producing and consuming States over state or federal regulatory authority is highlighted in the contrast between Louisiana's amicus brief in this case and the statement of the Chairman of the New York Public Service Commission in another case. Louisiana, a producing State, submits:
>
> "Historically, gas producing states have certain ad-

vantages over states which do not have their own gas supply. Their very proximity to the source of production attracts industries which use gas as the raw material without which their plants could not operate. The lower transportation costs of delivering gas to other industrial and commercial users within the state makes its use particularly attractive for such applications. It is not surprising, therefore, that producing states have a higher proportion of industrial-commercial consumption of total gas consumed and of firm gas than consuming states. Louisiana utilitizes 84% of the total quantity of firm gas sold in the state for industrial and power plant generation purposes, in comparison to a national average of only 37%.

"Louisiana's economy is heavily dependent upon the availability of a firm, reliable and uninterrupted supply of natural gas. Statewide investment by industrial category clearly reflects the predominance of petroleum, refineries and chemicals which represented $465,297,370 or 76% of a total industrial investment of $609,578,850 in 1970. Apart from these industries which use natural gas as process gas without which their plants cannot function, the state's electric utilities are completely dependent upon natural gas as fuel for electric generators.

"Thus, the economic welfare of the state hinges upon the continued delivery of the volumes of gas it received and used prior to United's curtailment and upon the ability to draw upon greater volumes. Otherwise, its economy will be frozen at or below its present level. This is not true of other states in which natural gas plays a subsidiary rather than a dominant role in the overall economy of the state and in which the electrical utilities have alternate power sources such as coal, imported liquefied natural gas and inexpensive hydroelectric power." Brief of State of Louisiana Amicus Curiae pp 2-3."

Id. at ——— n.12, 92 S.Ct. at ——— n.12, 32 L.Ed.2d at 381 n.12.

[4]The same information, data and policy were put forward in the state's brief more recently in Louisiana v. FPC, 5 Cir., 197—, ——— F.2d ——— [No. 72-1220, argued September 27, 1972, Atlanta, Georgia], and emphasized by counsel's oral argument to this Court:

"We are here to discuss heat and power, Heat and power that is essential to the economic welfare of the

But oil and gas in Louisiana (and the oil-rich, offshore reserves) is important not only to Louisiana. It is important to the United States, as witnessed by this very case and the important earlier one, *Leiter Minerals, Inc. v. United States*, 1957, 352 U.S. 220, 77 S.Ct. 287, 1 L.Ed.2d 267. With both protagonists being sovereigns of equal standing and asserting claims over these rich stakes on the basis of Louisiana domestic law, the demands of a healthy federalism make it more than ordinarily appropriate that the underlying questions of state law be resolved by the only Court which can give an authoritative[5] answer — the Supreme

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State of Louisiana. We hope to do it with light.

"Louisiana is the largest gas-exporting state in the federal union. It is the second largest gas-producing state in the nation. It delivers to other states that cannot supply their own gas supplies 48 percent of all natural gas exported by producing states to states that cannot meet their own needs.

* * *

"Now plainly, we submit to Your Honors, Louisiana contributes more than its fair share to the national pool of natural gas.

* * *

"Now Louisiana is a producing state. It did not choose to become a producing state. It did not choose to have a wasting asset as its major natural resource. It would prefer to have capital that it could invest and have come back with increases in earnings."

Transcript of Oral Argument at 45-46.

[5] Of course an *Erie*-based judgment of this Court or on certiorari by the Supreme Court is authoritative in the sense that it determines the cause and constitutes *res judicata* or collateral stoppel as to the parties. But its *stare decisis* effect is entirely within the control of the Supreme Court of Louisiana under its power to alter, modify or reverse its prior holdings on which the *Erie*-bound federal court has acted. And perhaps even more important, without changing its law it may, as have many of the Supreme Courts within this Circuit, *reject* the reading which the Fifth Circuit has given to the pertinent

state law. See, e.g., Truck Ins. Exchange v. Seelbach, 1960, 161 Tex. 250, 339 S.W.2d 521, expressly rejecting National Surety Corp. v. Bellah, 5 Cir., 1957, 245 F.2d 936; Food Fair Stores, Inc. v. Trussel, Fla., 1961, 131 So.2d 730, expressly disapproving Pogue v. Great Atlantic and Pacific Tea Co., 5 Cir., 1957, 242 F.2d 575.

I exposed this fact in my 1967 dissent in W.S. Ranch Co. v. Kaiser Steel Corporation, 10 Cir., 1967, 388 F.2d 257:

> To me the sound approach continues to be the one reflected in the unreversed action of the Court in *Delaney*.[7] And experience since that time continues to bear out the strong note sounded by the concurring opinions[8] that real injustice is done to litigants and, worse, more damage is done to the states' jurisprudence and its policies by a headstrong, resolute, inflexible determination on the part of a federal court to barge ahead in a sort of ascetic, misguided *Winter Haven* impulse, than will likely result from the slight delay occasioned by invoking state adjudication of the controlling issues.[9] For the simple fact is that more and more,[10] more federal courts are being overruled by more state courts on local issues upon which such federal courts have undertaken to read the *Erie* signs in the quest of the *Winter Haven* grail.
>
> Texas, for example, continues on its path of independence in a number of instances[11] not the least of which was the Fifth Circuit's *Delaney* prediction itself.[12] But, this is not an infirmity of the Fifth Circuit alone.[13] And the experience in Florida demonstrates that state court reversals of Federal appellate decisions occur both in appeals of state cases[14] and on *Clay* certification (see note 5 supra) to the Supreme Court of Florida, the latter with some spectacular results.[15]

[7] United Services Life Ins. Co. v. Delaney, 5 Cir. 328 F.2d 483 (en banc), cert. denied, 1964, 377 U.S. 935, 84 S.Ct. 1335, 12 L.Ed.2d 298, on motion for rehearing en banc, 5 Cir., 358 F.2d 714, cert. denied, 1966, 385 U.S. 846, 87 S.Ct. 39, 17 L.Ed.2d 77.

[8] See United States Life Ins. Co. v. Delaney, supra, 328 F.2d at 485 (concurring opinion). The *Delaney* abstention procedure and the justification for it sought to be articulated by the concurring opinion have come in for some spirited criticism. See Agata, Delaney, Diversity, and Delay: Abstention or Abdication?, 4

Houston L.Rev. 422 (1966) (Special Fifth Circuit Issue).

[9]Subsequent *Delaney* judicial events in neither the Texas State Courts nor the Fifth Circuit (traced in note 5, Aetna Life Ins. Co. v. Barnes, 5 Cir., 1966, 361 F.2d 685, 687) prove that when employed with a little enlightened resourcefulness on the part of either counsel, trial court, or appellate court the *Delaney* abstention is unworkable or administratively unsound. It is safe to say that no one on the Fifth Circuit, majority or dissenting, entertained for the briefest fraction of a possible division of a moment the idea that on recourse to the state courts after remand either counsel or the Texas courts would suppose that the single critical issue be excised for a sort of law-school academic inquiry in the declaratory judgment proceeding.

[10]In the score sheet which follows (notes 11, 12, 13 and 14 infra), I do not repeat the cases documented in *Delaney*.

[11]See, e. g., Felmont Oil Corp. v. Pan-American Pet. Corp., Tex.Civ.App., 1960, 334 S.W.2d 449, error ref'd n.r.e., which expressly refuses to follow Sinclair Oil & Gas Co. v. Masterson, 5 Cir., 1959, 271 F.2d 310; see E. Brown, Law of Oil & Gas Leases, 1958: 1966 Cumulative Supplement, p. 293: Weymouth v. Colorado Interstate Gas Co., 5 Cir., 1966, 367 F.2d 84, 102 n. 57.

[12]Prof. Agata points this out "Additionally and ironically, Judge Brown can now add *Delaney* to the list of wrong guesses. Concluding that 'judicial statesmanship of the highest and proper order' dictated permitting Texas courts to decide the legal issue, and noting that Texas 'has a judicial system which will permit adjudication with dispatch and speed' and 'with its full arsenal of procedural devices * * * will enable the parties to have a prompt and completely sufficient determination.' Judge Brown and his colleagues had again failed to anticipate the state court ruling. Texas refused to hear the case." (Citing United Services Life Ins. Co. v. Delaney, Tex.Civ.App., 386 S.W.2d 648, aff'd., Tex., 1965, 396 S.W. 2d 855). Agata, supra note 8, at 424.

[13]See Yarrington v. Thornburg, Del., 1964, 205 A.2d 1, 11 A.L.R.3d 1110, rejecting Truitt v. Gaines, D.Del., 1961, 199 F.Supp. 143; Travelers Ins. Co. v. Auto-Owners (Mut.) Ins. Co., 1964, 1 Ohio App.2d 65, 203 N.E.2d

846, rejecting American Fid. & Cas. Co. v. Indemnity Ins. Co. of North America, 6 Cir., 1962, 308 F.2d 697, Kelly v. State Auto Ins. Ass'n, 6 Cir., 1961, 288 F.2d 734, and Travelers Ins. Co. v. Ohio Farmers Indem. Co., 6 Cir., 1958, 262 F.2d 132.

[14]Weed v. Bilbrey, Fla.App., 2d Dist., 1967, 201 So.2d 771, rejecting outright Emerson v. Holloway Concrete Prods. Co., 5 Cir., 1960, 282 F.2d 271, cert. denied, 1961, 364 U.S. 941, 81 S.Ct. 459, 5 L.Ed.2d 372, and expressly adopting the dissent of Brown, J. in the *Emerson* case, 282 F.2d at 278.

[15]See, e.g., Life Ins. Co. of Va. v. Shifflet, 5 Cir., 1966, 359 F.2d 501, upholding a jury verdict against the insurance company under the construction of the Florida Insurance Statutes on fraudulent misrepresentation. But then see, 5 Cir., 1967, 370 F.2d 555, granting a motion for rehearing and certifying the question to the Supreme Court of Florida, which in Life Ins. Co. of Va. v. Shifflet, Fla., 1967, 201 So.2d 715, reached a result opposite from the one reached in the original Fifth Circuit opinion. On receipt of the answer to the certified question, the Fifth Circuit vacated the earlier judgment and remanded the case to the district court. See 380 F.2d 375.

And see especially Hopkins v. Lockheed Aircraft Corp., 5 Cir., 1966, 358 F. 2d 347 in which the Court certified to the Supreme Court of Florida the controlling question of the dollar limitation on damages for wrongful death, a problem presenting fundamental and serious questions of state policy with only fragmentary case materials with which to work. The determination of the question was so difficult, not only for the Federal Court in the light of intervening developments in the law of conflicts but also for the Supreme Court of Florida, that it resulted actually in two opinions before the question was settled. See the opinion at 201 So.2d 743 holding that the situs state dollar limitation was contrary to Florida policy and the opinion at 201 So.2d 749 where, on rehearing, the Court reversed itself to validate the Illinois recovery limitation. No amount of prescience, including that thought by some to come from a Federal Commission, enables a non-Florida Judge authoritatively to determine Florida policy.

388 F.2d 264-65 (original footnotes retained). Since *Kaiser Steel* the list has continued to grow.

Court of Louisiana. Indeed, the United States Supreme Court in the context of this struggle between sovereign giants has itself recognized the desirability of having Louisiana courts construe Louisiana law. Recognizing, as we must do here, that any federal construction of Louisiana law would be law only until an authoritative judgment by the Louisiana Supreme Court is rendered, the Court has expressed the following thoughts:

> The answers to these question [of state law] are, or may be, relevant. Before attempting to answer them and to decide their relation to the issues in the case, we think it advisable to have an interpretation, if possible, of the state statute by the only court that can interpret the statute with finality, the Louisiana Supreme Court.

Leiter Minerals, Inc. v. United States, supra at 229, 77 S.Ct. at ____, 1 L.Ed.2d at 267.

And, putting its words into action, the Supreme Court in *Leiter* required the federal court to stay its hand pending resolution of the State law via a separate proceeding to be brought in state court under the Louisiana declaratory judgment statute.[6]

Louisiana's claim to determine domestic legal principles bearing on the allocation and ownership of her oil and gas is no less a matter of great public policy

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[6]With a like recognition of deference due a sovereign the Supreme Court of Louisiana proceeded to determine the case even though it was much concerned whether it was rendering what would, under its jurisprudence, be an impermissible advisory opinion. See Leiter Minerals v. California Co., 1961, 241 La. 915, 132 So.2d 845.

than was the claim of the state of New Mexico to adjudicate cases and controversies involving her precious natural resource — water. See *W.S. Ranch Co. v. Kaiser Steel Corporation*, 10 Cir., 1967, 388 F.2d 257, 262-67 in which, as a dissenter on the petition for rehearing, I urged the Tenth Circuit, as I now do the Fifth, to give way to the courts of New Mexico. Following the reversal by the Supreme Court, 1968, 391 U.S. 593, 88 S.Ct. 1753, 20 L.Ed.2d 835, the Supreme Court of New Mexico expressly rejected the Tenth Circuit's determination, 388 F.2d 257, of the decisive question of local law. See *Kaiser Steel Corporation v. W.S. Ranch Co.*, 1970, 81 N.M. 414, 467 P.2d 986.

Fortunately for Louisiana, there is no longer a need to strain at parallel declaratory judgment proceedings as in *Leiter* or *Kaiser Steel, supra*. For Louisiana has recently adopted the now available, effective procedure which permits a federal appellate court to certify questions of state law to the Louisiana Supreme Court.[7] Thus, the objective of an authoritative determination with finality can be attained with significantly reduced logistical problems.

In these times when comity and abstention have become the by-line for Federal Judges,[8] it is unfortunate

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[7]Act 84 of 1972, Louisiana Legislature.

[8]See *Leiter Minerals, supra; Kaiser Steel, supra;* and the famed February Sextet: Younger v. Harris, 1971, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669; Samuels v. Mackell, 1971, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688; Boyle v. Landry, 1971, 401 U.S. 77, 91 S.Ct. 758, 27 L.Ed. 2d 696; Perez v. Ledesma, 1971, 401 U.S. 82, 91 S.Ct. 674, 27 L.Ed.2d 701; Dyson v. Stein, 1971, 401 U.S. 200,91 S.Ct. 769, 27 L.Ed.2d 781; Byrne v. Karalexis, 1971, 401 U.S. 216, 91 S.Ct. 777, 27 L.Ed.2d 792.

that the Fifth Circuit adopts this head-in-the-sand rejection of the State's effort to alleviate our *Erie* burden. Our wide experience with certification to the Florida Supreme Court has not only proved its utility in sparing this Court — and more importantly, the litigants — the risk of a wrong decision,[9] but it has recently evoked a most favorable response from that tribunal. See *National Education Association, Inc. v. Lee County Board of Public Construction*, Fla. 1972, 260 So.2d 206.

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[9] It started with Clay v. Sun Ins. Office, Ltd., 1960, 363 U.S. 207, 80 S.Ct. 1222, 4 L.Ed.2d 1170, on certification upon remand, Fla., 1961, 133 So.2d 735, on receipt of answers to certification, 5 Cir., 1963, 319 F.2d 505, reversed, 1964, 377 U.S. 179, 84 S.Ct. 1197, 12 L.Ed.2d 229.

Thereafter we have used it frequently. See, Gordon v. The John Deere Company, 5 Cir., 1971, 451 F.2d 234, on certification, Fla., 1972, ____ So.2d ____ (No. 41,743, July 5, 1972), on receipt of answers to the certification, 5 Cir., 1972, ____ F.2d ____ (No. 71-1824, , 1972); National Education Association, Inc. v. Lee County Board of Public Instruction, 5 Cir., 1971, 448 F.2d 451, on certification, Fla., 1972, 260 So.2d 206, on receipt of answers to certification, ____ F.2d ____; Allen v. Estate of Carman, 5 Cir., 1971, 446 F.2d 1276; Boyd v. Bowman, 5 Cir., 1971, 443 F.2d 848, on certification, Fla., 1971, ____ So.2d ____ (No. 41,117, November 24, 1971); A. R. Moyer, Inc. v. Graham, 5 Cir., 1971, 443 F.2d 434; Martinez v. Rodriquez, 5 Cir., 1968, 394 F.2d 156, on certification, Fla., 1968, 215 So.2d 305, on receipt of answers to certification, 5 Cir., 1969, 410 F.2d 729; Life Ins. Co. of Va. v. Shifflet, 5 Cir., 1967, 370 F.2d 555, on certification, Fla., 1967, 201 So.2d 715, on receipt of answers to certification, 5 Cir., 1967, 380 F.2d 375; Hopkins v. Lockheed Aircraft Corp., 5 Cir., 1966, 358 F.2d 347, on certification, Fla., 1967, 201 So.2d 743, on receipt of answers to certification, 5 Cir., 1968, 394 F.2d 656; Green v. American Tobacco Co., 5 Cir., 1962, 304 F.2d 70, on rehearing, 304 F.2d 85, on certification, Fla., 1963, 154 So.2d 169, on receipt of answers to certification, 5 Cir., 1963, 325 F.2d 673, cert. denied, 1964, 377 U. S. 943, 84 S.Ct. 1349, 12 L.Ed.2d 306, on appeal after retrial, 391 F.2d 97, rev'd. on rehearing en banc, 1969, 409 F.2d 1166.

Believing that certification of the questions of state law in this case would foster the ends of federalism and contribute immeasurably to the correct interpretation of Louisiana law,[10] I would grant rehearing en banc and certify the difficult questions of state law to the Louisiana Supreme Court.

I therefore dissent to the failure of the Court to grant rehearing en banc.

INGRAHAM, Circuit Judge, with whom CLARK, Circuit Judge, joins specially concurring:

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[10]On numerous times, separate panels of our Court have expressed their yearning for a Florida-type certification procedure to resolve unsettled points of pure state law. E.g., Lee v. Great Northern Nekoosa Corp., 5 Cir., ——— F.2d ———, ——— n.1 [No. 71-2944, August 29, 1972, at 1 n. 1]:

> We regret our inability to certify the questions to the Supreme Court of Alabama for its authoritative resolution as would be possible if the case involved Florida law. Section 25.031, Florida Statutes Annotated as implemented by Rule 4.61 of the Florida Appellate Rules. See Clay v. Sun Insurance Office, Ltd., 1960, 363 U.S. 207, 80 S.Ct. 1222, 4 L.Ed.2d 1170.

Our efforts to do this in Texas were aborted by the Supreme Court of Texas because it concluded the partial declaratory proceeding would constitute an advisory opinion. See United Services Life Ins. Co. v. Delaney, 5 Cir., 1964, 328 F.2d 483 (en banc) (abstaining), dismissed, Tex., 1965, 396 S.W.2d 855, decided, 5 Cir., 1966, 358 F.2d 714. See, generally, *Agata, Delaney,* Diversity, and Delay: Abstention or Abdication?, 4 Hou.L.Rev. 422 (1966); Gowen and Izlar, Federal Court Abstention in Diversity of Citizenship Litigation, 43 Tex.L.Rev. 194 (1964); Comment, Abstention under *Delaney:* A Current Appraisal, 49 Tex.L.Rev. 247 (1971). In order to allow the State of Texas to construe her own law, we must, under the current view, dismiss the federal litigation. Barrett v. Atlantic Richfield Co., 5 Cir., 1971, 444 F.2d 38.

While I am in agreement with the panel opinion in *United States v. Buras*, 458 F.2d 346 (1972), believe that it correctly analyzes and interprets the law on the subject, and voted against en banc review, I am in accord with Chief Judge Brown's efforts to certify the questions of state law to the Louisiana Supreme Court if it is feasible to do so.

* * *

APPENDIX E

ORDER DENYING LEAVE TO FILE SECOND PETITION FOR REHEARING AND REHEARING EN BANC

Filed: MAR. 21, 1973

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 31115

UNITED STATES OF AMERICA,
Plaintiff-Appellant-
Cross Appellee,

and

CHEVRON OIL COMPANY, ALLEN L. LOBRANO, MRS. ETHEL M. FONTENELLE LOBRANO, ROBERT LEO LOBRANO AND KAREN KATHERINE LOBRANO,
Additional Defendants-Appellants-
Cross Appellees,

versus

LEON BURAS, JR., ET AL,
Defendants (1-26)-Appellees-
Cross Appellants,

versus

PHILIBERT BURAS, ET AL,
Intervenors-Appellants.

Appeals from the United States District Court for the Eastern District of Louisiana

---

Before TUTTLE, GEWIN and GOLDBERG, Circuit Judges.

BY THE COURT: IT IS ORDERED that the motion of Appellees-Cross Appellants, Leon Buras, Jr., Et Al, for leave to file a second petition for rehearing and rehearing En Banc in the above cause is hereby DENIED.

* * *

APPENDIX F

ORDER DENYING LEAVE TO FILE SECOND PETITION FOR REHEARING AND REHEARING EN BANC

Filed: APR. 25, 1973

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 31115

UNITED STATES OF AMERICA,
Plaintiff-Appellant-
Cross Appellee,

and

CHEVRON OIL COMPANY, ALLEN L. LOBRANO, MRS. ETHEL M. FONTENELLE LOBRANO, ROBERT LEO LOBRANO AND KAREN KATHERINE LOBRANO,
Additional Defendants-Appellants-
Cross Appellees,

versus

LEON BURAS, JR., ET AL,
Defendants (1-26)-Appellees-
Cross Appellants,

versus

PHILIBERT BURAS, ET AL,
Intervenors-Appellants.

Appeals from the United States District Court for the Eastern District of Louisiana

---

ON MOTION FOR LEAVE TO FILE SECOND PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC.

Before TUTTLE, GEWIN and GOLDBERG, Circuit Judges.

PER CURIAM: No member of this panel or Judge in regular active service on the Court having requested that the Court be polled on the motion for leave to file the second petition for rehearing en banc (Rule 35, Federal Rules of Appellate Procedure, Local Fifth Circuit Rule 12) the motion for leave to file the second petition for rehearing en banc, theretofore denied by the panel, is again Denied.

* * *

APPENDIX G

JUDGMENT OF THE DISTRICT COURT

Filed: July 30, 1970

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

UNITED STATES OF AMERICA,
Plaintiff,
NO. 4977
versus CIVIL ACTION
SECTION "A"

LEON BURAS, JR., THEODORE BURAS, JOHN BAPTISTE BURAS, ETHEL DOROTHEA BURAS, Wife of Norman J. Buras, BARBARA MACHELLA, Wife of Joseph C. Ragas, GEORGE (GEORGES) SALINOVICH, GREGORY ANTHONY SALINOVICH, SAMUEL MATTHEW SALINOVICH, STELLA SALINOVICH, Wife of Paul Buras, ALTON WILFRED SALINOVICH, ELEANOR COLUDROVICH, Wife of Harmon D. Creel, Jr., ANTHONY COLUDROVICH, JOHN COLUDROVICH, EUNICE INEZ MARY BURAS, Wife of Karl W. Gille, MILDRED AGNES BURAS, Wife of Nicholas F. Bubrig, ESTELLE VERONICA BURAS, Wife of Edgar Monnin, RAYMOND BURAS, ELDA JULIA BURAS, Wife of Homer Lindsey, HORACE BURAS, LOUISE FRANCES SALINOVICH, Wife of Peter B. Algero, JOSEPHINE SALINOVICH, Wife of Hansell Breaux, MADELEINE COLUDROVICH,

Wife of Norvel A. Jackson, NEWTON BURAS, LAWRENCE ERNEST BURAS, and REVA MARY BURAS, Wife of George Stevens,

Defendants,

THE LEITER MINERALS, INC., THE CALIFORNIA COMPANY, ALLEN L. LOBRANO, MRS. ETHEL M. FONTENELLE LOBRANO, ROBERT LEO LOBRANO, THROUGH MRS. ETHEL M. FONTENELLE LOBRANO, NATURAL TUTRIX, KAREN KATHERINE LOBRANO, THROUGH MRS. ETHEL M. FONTENELLE LOBRANO, NATURAL TUTRIX,

Additional Parties Defendants.

JUDGMENT

This action came on for trial before the Court and a jury, the Honorable Herbert W. Christenberry, District Judge, presiding, and the issues having been duly tried to the jury, the Court instructed the jury to find a special verdict on written interrogatories, as to which the jury made answers as follows, to-wit:

"FIRST SERIES

"1. Did the Governor of Louisiana sign the 1898 patents to Octave Barrois involved in this case? Please answer Yes or No.

"Answer: The jury reported that it could not answer this interrogatory.

"2. At the time of the January 5, 1899 sale from Octave Barrois to Pierre Leon Buras was Pierre Leon

Buras aware of any wrongdoing on the part of the Reg
ister of the State Land Office or was he otherwise a
ware of any question that could affect the validity o
the 1898 Barrois patents? Please answer Yes or No

"Answer: No.

"3. Were the following streams navigable prior t
1904? Place a check mark in the appropriate column.

	Yes	*N*
Long Island Bayou	X	
Yuratich Bayou	X	
Forty Barrel Bayou	X	
Romere Pass	X	
East Fork, Romere Pass	X	
Willow Bayou	X	
Charlie's Pass	X	
Bennie's Pass	X	
Battery Bayou	X	
Octave's Pass	X	
Bayou Minot	X	
Four Bucket Bayou	X	

"4. When Dean, Wenck, and Taylor bought from Au
gustin Buras in 1911, was Jefferson C. Wenck awar
of facts sufficient to put a prudent person on inquiry a
to a possible defect in title? Please answer Yes o
No.

"Answer: Yes.

"5. Did Dean, Wenck, and Taylor commence th
exclusive, physical possession required for the ac

verse possession of 10 years of any portion of the lands acquired in 1911 from Augustin Buras? Please answer Yes or No.

"Answer: No.

"6. Did Dean, Wenck, and Taylor commence the exclusive, physical possession required for the adverse possession of 30 years of any portion of the lands acquired in 1911 from Augustin Buras? Please answer Yes or No.

"Answer: No.

"7. When Joseph Leiter bought from Dean, Wenck, and Taylor in 1916, was his agent, John Dymond, Jr., aware of facts sufficient to put a prudent person on inquiry as to a possible defect in title? Please answer Yes or No.

"Answer: Yes.

"8. Did John Dymond, Jr., or anyone on his behalf, make a title examination in connection with Joseph Leiter's purchase in 1916 from Dean and Taylor? Please answer Yes or No.

"Answer: Yes.

"9. When the Government bought from Thomas Leiter on December 2, 1938, were any of its agents or employees aware of facts sufficient to put a prudent person on inquiry as to a possible defect in the title?

(By "agents or employees" is meant any of its attorneys who were examining the title or any of its responsible officials charged with the duty of acquiring the property for the Government.) Please answer Yes or No.

"Answer: Yes.

"10. Prior to and in connection with the Government's acquisition from Thomas Leiter on December 21, 1938, did the Government, or anyone on its behalf, direct the abstract company to examine the public records for such a period of time prior to the 1903 Barrois patents as would have revealed the Pierre Leon Buras title? Please answer Yes or No.

"Answer: Yes.

"SECOND SERIES

"1. Did Joseph Leiter commence the exclusive, physical possession required for the adverse possession of 30 years of any portion of any of the numbered tracts after his purchases in 1916, 1918 and 1921 respectively? Please answer Yes or No.

"Answer: Yes.

"2. List which of the tracts, numbered 1 through 15 on the map, were so possessed by him, and as to each tract, state the year such possession commenced. Answer:

Tract No.	*Year*
1	1916
2	1916
3	1916
4	1916
5	1916
6	1916
7	1916
8	1921
9	1921
10	1921
11	1916
12	1916
13	1916
14	1916
15	1918

"3. With respect to the lands possessed, considering your answer in question 2, were the limits of possession clearly identified by visible boundaries, either by natural or artificial means, sufficient to give notice to the public of the identity and extent of possession and to fix the limits of the lands possessed? Please answer Yes or No.

"Answer: Yes.

"4. If your answer to question 3 is Yes, what tracts listed in question 2 were located within such boundaries and state the year the boundaries were first sufficient? Answer:

Tract No.	*Year*
1	1916
2	1916
3	1916
4	1916
5	1916
6	1916
7	1916
8	1921
9	1921
10	1921
11	1916
12	1916
13	1916
14	1916
15	1918

"5. Did Joseph Leiter intend to abandon possession (as distinguished from ownership) at any time during the period from 1921 to 1927 of any or all of the tracts you may have listed in your answer to the previous question? Please answer Yes or No.

"Answer: No.

"If your answer is Yes, please list the tracts possession of which he intended to abandon and any tracts possession of which he did not intend to abandon:

Possession Abandoned: _____

Possession Not Abandoned: _____

"6. Considering the tracts you may have listed in your answer to question 4, did Joseph Leiter at any time during the period from 1921 to 1927 fail to remain in exclusive, physical possession or civil possession accompanied by sufficient external and public signs necessary to continue the civil possession of them. Please answer Yes or No.

"Answer: No.

"If your answer is Yes, state which of the tracts listed in your answer to question 4 fall in this category. Answer: _____

"7. Considering the tracts you may have listed in your answer to question 4, during the period from 1921 to 1927; did any natural or artificial boundaries that may have originally existed become insufficient to clearly identify the limits of possession and to give notice to the public of the identity and extent of possession? Please answer Yes or No.

"Answer: Yes.

"If your answer is Yes, state which tracts listed in your answer to question 4 fall in this category. Answer: 5, 6, 7, 10, 11, 12, 13, 14.

"8. Did any of the Buras heirs make protest against the occupancy of the disputed lands by the Government and apply for redress to officials of the Government

with responsible authority in the matter? Please answer Yes or No.

"Answer: Yes.

"If your answer is Yes, when was such protest and application for redress made?

"Answer: 1945."

Based upon the jury's special verdict on these interrogatories, it appearing to the Court that the Buras heirs are entitled to judgment in their favor recognizing their ownership of the lands in dispute, and that there is no just reason for delay in entering final judgment herein,

IT IS ORDERED, ADJUDGED AND DECREED that final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure be entered herein in favor of Defendants (1-26), their successors and assigns (hereinafter referred to as "the Buras heirs"), decreeing them to be the owners of the following described lands, including all alluvial accretions, to-wit:

> The fractional Northeast Quarter (NE 1/4) and the fractional Southeast Quarter (SE 1/4) of the Southwest Quarter (SW 1/4) of fractional Section Twenty-three (23), Northwest of Main Pass; the East Half (E 1/2) of Fractional Section Twenty-six (26), Northwest of Main Pass; the fractional East Half (E 1/2) of Section Twenty-seven (27); the South Half (S 1/2)

of the South Half (S 1/2) of Section Twenty-eight (28); the South Half (S 1/2) of the Southwest Quarter (SW 1/4) of Section Thirty-three (33); the Northwest Quarter (NW 1/4) of fractional Section Thirty-four (34); all in Township Twenty South (20 S), Range Nineteen East (19 E), St. Helena Meridian, Louisiana; the Northeast Quarter (NE 1/4) and the Southwest Quarter (SW 1/4) of Fractional Section Four (4), Northeast of the Forty Arpent Line; and the East Half (E 1/2) of Fractional Section Three (3), Northwest of Main Pass, all in Township Twenty-one South (T 21 S), Range 19 East (R 19 E), St. Helena Meridian, Louisiana. (The above-described lands are hereafter referred to as "the subject lands.")

LESS AND EXCEPT:
An undivided one-half (1/2) interest in and to all minerals and mineral rights pertaining to said lands;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of the Buras heirs on their cross-claim against Chevron Oil Company, Allen L. Lobrano, Mrs. Ethel M. Fontenelle Lobrano, Robert Leo Lobrano, and Karen Katherine Lobrano (hereinafter designated as "Defendants (28-32)"), recognizing that the Buras heirs are the true and lawful owners of one-half of the oil, gas and other minerals, and mineral rights in and under the subject lands and are entitled to full and undisturbed posses-

sion of said minerals and mineral rights. The oil, gas, and mineral leases heretofore granted by the United States to the parties Lobrano and assigned to Chevron Oil Company are hereby cancelled insofar as said leases purport to cover the one-half of the minerals owned by the Buras heirs;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendants (28-32) render an accounting to the Buras heirs for one-half of all the oil, gas and other minerals produced and extracted from the subject lands, including any alluvial accretions. Pursuant to a prior partial compromise between the parties, the accounting will allow as a credit against the amount going to each of the Buras heirs that proportion of $842,000 attributable to his or her particular fractional interest as an heir of Pierre Leon and Eleanor Buras. The accounting shall show a breakdown as to production and expenses prior to November 18, 1953 and subsequent to that date, the Court reserving judgment as to whether the prescription of one year precludes recovery for minerals extracted prior to that date, and the Court further reserving judgment as to whether Defendants (28-32) shall be entitled to offset any items of expense against the value of minerals extracted. The accounting will sufficiently detail all items of expense claimed as credits so as to allow a prompt and accurate legal determination as to whether particular items can be offset against the value of the minerals extracted by Defendants (28-32). The accounting shall also detail the well-head prices of minerals extracted at all times material herein;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that subject to Court approval of said accounting, there be judgment herein in favor of the Buras heirs and against Defendants (28-32) for one-half of the full amount of the value of all the oil, gas and other minerals which have been removed from the subject lands by Defendants (28-32), together with legal or judicial interest from November 18, 1954, as to all production prior to that date; and with legal or judicial interest from date of production as to all production subsequent to November 8, 1954; all legal or judicial interest shall be computed through the date of payment in accordance with the applicable laws of the State of Louisiana and shall be based upon mineral values as of the date of production;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of the United States of America and against the Buras heirs with respect to the North Half (N 1/2) of the Southeast Quarter (SE 1/4) of Section 28, Township 20 South, Range 19 East, and the title of the United States of America in and to the said lands is hereby quieted against any claims thereto on the part of the Buras heirs who are hereby permanently enjoined from asserting any rights, title, interest, claim or demand in and to the said property.

Based upon the submission of the intervention of Philibert Buras, et al., to the Court alone, and considering the stipulation of all parties concerning the facts on which the intervenors rely,

IT IS ORDERED, ADJUDGED AND DECREE that the intervention of Philibert Buras, et al., be an the same is hereby dismissed with prejudice, at Inte venors' cost.

The Court having previously considered the motio filed under Rule 50(b) by the United States and D fendants (28-32), hereby denies that motion for the re sons set forth in the opinion filed herein on July 1970.

IT IS FURTHER ORDERED, ADJUDGED AN DECREED that all costs of this proceeding, excep those relating to the intervention of Philibert Bura et al., be assessed against Defendants (28-32) and, the extent permitted by law, against the United Stat of America.

New Orleans, Louisiana
July 30, 1970

/s/ HERBERT W. CHRISTENBERRY
Herbert W. Christenberry
United States District Judge

* * *

APPENDIX H

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1971

No. 31115

D. C. Docket No. CA 4977

UNITED STATES OF AMERICA,
Plaintiff-Appellant-
Cross Appellee,

and

CHEVRON OIL COMPANY, ALLEN L. LOBRANO, MRS. ETHEL M. FORTENELLE LOBRANO, ROBERT LEO LOBRANO AND KAREN KATHERINE LOBRANO,
Additional Defendants-Appellants,
Cross Appellees,

versus

LEON BURAS, JR., ET AL,
Defendants-Appellees-
Cross Appellants,

versus

PHILIBERT BURAS, ET AL,
Intervenors-Appellants.

Appeals from the United States District Court for the Eastern District of Louisiana

---

Before TUTTLE, GEWIN and GOLDBERG, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court for entry of judgment quieting title to these lands in the United States;

It is further ordered that plaintiff-appellant, United States of America, recover its costs from all other parties in this appeal.

Issued as Mandate: March 23, 1972

APPENDIX I

AMICUS BRIEF OF STATE OF LOUISIANA IN SUPPORT OF PETITION FOR REHEARING AND REHEARING EN BANC

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 31115

UNITED STATES OF AMERICA,
Plaintiff-Appellant-
Cross Appellee,

and

CHEVRON OIL COMPANY, ALLEN L. LOBRANO, MRS. ETHEL M. FONTENELLE LOBRANO, ROBERT LEO LOBRANO AND KAREN KATHERINE LOBRANO,
Additional Defendants-Appellants-
Cross Appellees,

versus

LEON BURAS, JR., ET AL.,
Defendants (1-26)-Appellees-
Cross Appellants,

versus

PHILIBERT BURAS, ET AL.,
Intervenors-Appellants.

BRIEF OF THE STATE OF LOUISIANA AMICUS CURIAE

BY THE ATTORNEY GENERAL
OF THE STATE OF LOUISIANA,
WILLIAM J. GUSTE, JR.

MAY IT PLEASE THE COURT:

It is the position of the State of Louisiana that if the decision in this case is permitted to stand, as written or with no material changes in the rationale and conclusions, it may cause the long standing administrative construction of the public land laws of Louisiana to be relegated very largely to oblivion, and with it adversely affect the seemingly settled property law of Louisiana as it relates to land patents.

One well versed in the public land law of Louisiana easily discerns prominent errors in this Honorable Court's Opinion of March 23, 1972.

THE FIRST PROMINENT ERROR

The Court has misconstrued Act 75 of 1880.

This Court has apparently concluded that Act 75 of 1880 created the *exclusive* pattern for sale of the lands in dispute. Such is not the case. Act 75 of 1880 did not purport either to "repeal" or "amend and re-enact" the existing law (Act 38 of 1870 as amended and

re-enacted by Act 104 of 1871), and on the contrary, merely purported in its preamble to "readjust the State Land Office." Thus the broad and specific powers granted to the Register in Sections 2 and 3 of Act 104 of 1871 were not repealed. They provide:

> Sale by Register.
>
> SEC. 2. *Be it further enacted, etc.,* That the Register of the State Land Office shall be, and is hereby authorized to sell the swamp and overflowed lands donated by acts of Congress of second of March, 1849, and September twenty-eighth, 1850, for one dollar and twenty-five cents per acre; *provided,* that no purchaser under this section shall be allowed to enter more than one hundred and sixty acres.
>
> Price of lands subject to tidal overflow.
>
> SEC. 3. *Be it further enacted, etc.,* That the public lands donated by Congress to the State of Louisiana, which are subject to tidal overflow so as to be rendered unfit for settlement and cultivation, designated as swamp and overflowed lands, within the intent of the several acts of Congress relating thereto, which have been approved to the State of Louisiana by the general government as swamp and overflowed lands, shall be subject to entry at the rate of twenty-five cents per acre; *provided,* that satisfactory proof be filed with the Register of the State Land Office that any land

> sought to be purchased under the provisions of this section is subject to tidal overflow so as to be rendered unfit for settlement and cultivation.

Since the Register was authorized to *sell*, a corollary is that he was authorized to receive payment. The earlier statutory precept of payment by a purchaser directly to the Treasurer was not retained in the 1871 Act and was therefore not law when the General Assembly had Act 75 of 1880 under consideration. Those with experience in dealing with Act 75 of 1880 are likely to agree that the chief importance of the Act was to enlarge the duties of the Register — not to restrict them. But this Honorable Court has seized upon the language of Section 7 as interdicting the handling of sale proceeds by the Register. This Court's error stems from a simple legislative oversight. When the earlier precept of payment for lands by purchaser to treasurer was removed (if not by Act 104 of 1871 — then certainly by Section 4 of Act 75 of 1880), Section 7 was not modified as it should have been to harmonize with the new concept. Rather, it was left verbatim as written in Section 8 of Act 38 of 1870. The true significance of the treasurer's receipt issued under Section 7 of Act 75 of 1880 since the removal of the requirement of payment directly by a purchaser to the treasurer will be considered in the discussion of —

THE COURT'S SECOND PROMINENT ERROR

The Court has failed to recognize and give effect to Louisiana's long-existing administrative construction of Act 75 of 1880.

No one can seriously question the fact that all Registers have received the purchase price of lands under Act 75 of 1880. The records of the Register's office show this to be a fact. Extracts from the Biennial Reports of the Register for the subject years are in evidence, and they show the various amounts paid by the Register to the Treasurer. Plaintiff's Ex. 6 establishes that Treasurer's receipts are part of the official records of the Register's Office. There is good reason for this. A purchaser does not transact business with the Treasurer — but with the Register alone. He receives a receipt from the Register. The Register secures the Treasurer's receipt and it is recorded in the Register's official records. We know of no instance in which the State Treasurer receives monies from private individuals. The State Treasurer is a constitutional officer who receives funds from appropriate state agencies — not individuals. Thus, the administrative practice has relegated Section 7 of Act 75 of 1880 (See Appendix to red cover brief of the Buras Heirs, p. 113) to a bookkeeping function. Upon payment to the Treasurer by the Register, a receipt is issued, and in order to facilitate auditing, the receipt is issued in the name of the purchaser showing also a description of lands purchased. The receipt, incidentally, refers specifically to the earlier receipts given by the Register to the purchaser such as "Register's Number 1343 N.S.S." meaning "New Series Smith." The Treasurer's receipt

is supposed to be on file in the Register's Office before a patent is issued and signed by the Governor.

A THIRD PROMINENT ERROR

The Court has failed to recognize that payment made to the Register of State Lands is payment to the State.

While this Honorable Court may find some confusion in the retention of the language of Section 7 of Act 75 of 1880 in the face of the removal of the old requirement for payment directly by purchaser to treasurer, of one thing there can be no doubt — Louisiana has required all prospective purchasers under the Act to deal with and pay the *Register*. Ignoring the uniform administrative practice and perhaps relying upon the printing error in Section 4 of the 1880 Act (See Buras Heirs' red cover brief, p. 24), the new Register demanded that a new payment be made by Barrois.

The strange action taken by Smith, Lanier's successor as Register, which action the Court should have treated as abortive, in requiring dual payment of purchase price, repetitious procedure and in prevailing upon the Governor to issue new patents for the same lands, accomplished nothing of legal consequence but may only be regarded as a rather frivolous attempt on Smith's part to satisfy his own sense of propriety. If it was his intention to teach offenders a lesson in his effort, apparently aimed at breathing more integrity into Act 75 of 1880, Octave Barrois had done nothing to justify a reprimand or scolding and such impotent

action could not have rectified Lanier's defalcations. But, determined to have his way, Smith unjustly enriched the state by requiring payment of the purchase price twice and, by being responsible for the creation of two chains of title, was the architect for the hard-fought litigation that followed. The highly important and decisive thing done by Smith was his recognition of the authenticity of the original Barrois patents when they were presented to him (Def. Ex. 6b, App. of Exhibits), and the clear intention imputable to Smith that it was his purpose to have Barrois achieve his initial objective ("will aid him all I can in securing his land," same exhibit).

It is most interesting that Register Smith in demanding payment to him was doing the very same thing that he was saying his predecessor should not have done. Barrois paid him (Def. Ex. 6j, App. of Exhibits) for the second patents — not the Treasurer as stated by the Court.

To what extent Register Smith overburdened other land purchasers is not known. However, it is known that two purchasers stood on principle and went to Court to resist having to pay again. The *Lyons and Houston* case (referred to on page 23 of the Buras Heirs' red cover brief) settled Register Smith's misconception as to the requirement of a treasurer's receipt to support a valid patent. That case is squarely in point because there the Register was authorized to sell the particular lands. The same is true here, not only under Section 1 of Act 75 of 1880, but Sections 2 and 3 of Act 104 of 1871 as well. Since the Register

was authorized to sell, the corollary right to receive the purchase price clearly follows. Thus, the Louisiana Court by mandamus required Register Smith to issue a patent and the Governor to sign it, the admitted lack of a treasurer's receipt notwithstanding.

The cited case again demonstrates the undue significance placed by this Honorable Court on a treasurer's receipt. Insofar as state procedures are concerned, the function of the treasurer's receipt under Act 75 of 1880 is its internal bookkeeping value. It is equally clear that if state funds are mishandled internally, it is not the innocent citizen who should suffer. For instance, if the Collector of Revenue should not pay to the State Treasurer a certain assessment collected by him, is it conceivable that the State could proceed with collection of the same assessment again? The State of Louisiana will not deal with its citizens thusly and feels compelled to disavow any such actions by its officials in a by-gone era.

It is thusly apparent that this Honorable Court has promoted the treasurer's receipt under Section 7 of Act 75 of 1880 to a position far beyond its bookkeeping function under our Louisiana administrative practice, and in fact has given to that receipt equal or greater dignity than applied by the Court to a formal patent. This follows necessarily in view of the Court's ruling that a patent without a treasurer's receipt to back it up, is invalid. The Court's decision simply does not accord with Louisiana's interpretation of the statute as reflected by nearly a century of custom.

A FOURTH PROMINENT ERROR

The original Barrois patents were not subject to attack by holders under later patents.

It was pronounced in *J. W. Frellsen & Co. v. Crandell*, 120 La. 712, 45 So. 558 (1908), that:

> "A patent under the great seal of the state vests the legal title in the patentee, segregates the land from the public domain, and deprives the land department of jurisdiction. Hence, a subsequent application to enter the same land confers no inceptive rights on the applicant."

Since the United States Court of Appeals, Fifth Circuit, the same as the court below, was bound to follow Louisiana law, the rule in *Frellsen*, not since changed, should have governed the case. Yet this Court has suggested that the 1903 patents are valid on their face. Because the State Land Office had lost all jurisdiction over the subject lands through issuance of the earlier patents, the later patents conveyed no rights whatever.

It was more precisely held in *State v. Sweetlake Land and Oil Co.*, 164 La. 240, 113 So. 833 (1927), that:

> ". . . a land patent, if not void on its face, is not only a conveyance of the title for the land, but is in the nature of an official declaration by the department of the government to which the sale of the public lands is entrusted by law that all of the requirements preliminary to the

> issue of the patents were complied with, and that declaration, or presumption is not open to rebuttal in an action at law against an innocent transferee of the title from the patentee."

The same quotation last made above and taken from *Sweetlake* is found on page 22 of the red cover brief filed on behalf of the Buras heirs; however, the emphasis supplied differs. It is the writer's belief that the all-important thing in the entire quotation is found in the pronouncement in *Sweetlake* and other cases, that a state patent, valid on its face, creates a legal presumption that all prerequisites preliminary to the issuance of a patent had been complied with. It is also important, of course, that such presumption prevents an attack on the patent, except in two instances to be mentioned below. It is, however, the legal presumption which forms the basis for ensuing consequences favorable to the original patentee. It is that presumption which appears to be uniformly recognized and applied in all jurisdictions, which presumption appears to have found inception in certain cases of the Supreme Court of the United States. For example, it was held in *Ross v. Stewart*, 227 U.S. 530, 33 S.Ct. 347, 57 L.Ed. 626 (1913); *Dominguez de Guyer v. Banning*, 167 U.S. 723, 17 S.Ct. 937, 42 L.Ed. 340 (1897); and *Colorado Coal & Iron Co. v. United States*, 123 U.S. 307, 8 S.Ct. 131, 31 L.Ed. 182 (1887); that *a patent is presumptive evidence of the true performance of every prerequisite to its issuance.*

Albritton v. Shaw, 148 La. 427, 87 So. 32 (1921), a frequently cited case, established two prerequisites for an attack on a patent by the holder of a subsequent patent: (1) the person making the attack must have had an equitable title or an inceptive right upon the land, anteceding the issuance of the patent attacked; (2) the attack must be aimed at the jurisdiction or legal authority of the officers of the land department. The United States and its mineral lessee could not qualify under either prerequisite and, yet, they succeeded in trying. Their contention of lack of consideration had no merit whatever for only the state in an appropriate action could have raised that contention.

THE AFTER-ACQUIRED TITLE ISSUE

The State of Louisiana has no interest, as such, in that area of private law treating the after-acquired title doctrine. The Court is respectfully referred to the scholarly briefs of all parties on this issue.

A closely parallel doctrine deserves brief mention. When a patent issues, it is considered to be retroactively valid to the date of the application to enter and will inure to the benefit of any assignee of the entryman (*Woods v. Kimball,* 5 Mart. (N.S.) 246 (1826)). Applied to this case, Register Smith wrote on his order or receipt book that the Barrois application had preceded passage of a 1902 law increasing the per acreage swampland price. So did the Treasurer on his receipt (See Plaintiff's Ex. 6). This notation may have been made to justify allowing the 1898 price to control rather than the 1902 price. At any rate, both receipts acknowl-

edge the validity of the earlier application. The only earlier application was the one on which the 1898 patents were issued. Hence, if the 1903 patents were valid at all, they would be valid retroactively to the initial application. This would carry with it the vesting of title in the assignee of the entryman or Pierre Leon Buras. Neither principles of warranty, non-warranty, or quit-claim deeds should affect the application of the rule relating to the retroactive validity of a state land patent.

CONCLUSION

If the present decision stands, the State Land Office can expect a landslide business in verification of the validity of patents of record in the various parishes. Title examiners will no longer be able to rely on the fact of issuance of a patent as presumptive evidence that the statutory requirements for issuance have been met — a presumption that has heretofore been considered as conclusive once land is conveyed to an innocent purchaser. This Honorable Court may not consider this to be an unbearable burden on the State Land Office, but should this Court not also consider the vast extent of the unsettling influence that is being introduced for the first time in Louisiana's land law?

Respectfully submitted:

/s/ WILLIAM J. GUSTE, JR.

WILLIAM J. GUSTE, JR.
Attorney General of the State of Louisiana

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Issue	District Court	Court of Appeals	Amicus Brief of State of Louisiana	
1. Is the proof of issuance of a Treasurer's receipt a prerequisite to a determination of validity of the 1898 patents?	**NO.** App. B, p. 47a; App. on Appeal, p. 610.	**YES.** App. C, p. 68a.	**NO.** App. I, p. 118a.	"Th vie iss Act B, p. "A req by app Gov App See
2. Do the relevant Louisiana statutes require that the purchase price for patents be paid only to the State Treasurer?	**NO.** App. on Appeal, p. 610.	**YES.** App. C, p. 69a.	**NO.** App. I, pp. 115a 116a.	"A S. L fro a p
3. Did Louisiana law authorize the Register to receive the purchase price for patents?	**YES.** App. on Appeal, p. 610.	**NO.** App. C, p. 69a.	**YES.** App. I, p. 114a.	See

*All references are to the opinions of the District Cou
I respectively, except references to the charge of th

APPENDIX J

parison Of Positions Taken By The District Court, The Fifth Circuit And The State Of Louisiana (Amicus Curiae) With Respect To Points Of Louisiana Law At Issue*

us of of ana	District Court	Court of Appeals	Amicus Brief of State of Louisiana
p.	"These decisions give support to this Court's view that the statutory prerequisites for issuance of patents in 1898 as provided in Act 75 of 1880 were complied with." (App. B, p. 47a) "A treasurer's receipt was not an essential requirement for issuance of a valid patent by the State under the law of Louisiana as applicable to this case if you find that the Governor signed such a patent." (App. on Appeal, p. 610) See also 5, *infra*.	"Finally, it was the duty of the governor to issue patents for all lands sold *only on presentation of a Treasurer's receipt showing payment to the state* for the lands in question." (Emphasis in original.)	"It is thusly apparent that this Honorable Court has promoted the Treasurer's Receipt under Section 7 of Act 75 of 1880 to a position far beyond its bookkeeping function under our Louisiana administrative practice, and in fact has given to that receipt equal or greater dignity than applied by the Court to a formal patent. This follows necessarily in view of the Court's ruling that a patent without a Treasurer's receipt to back it up, is invalid. The Court's decision simply does not accord with Louisiana's interpretation of the statute as reflected by nearly a century of custom."
	"As register of the State Land Office, John S. Lanier was authorized by *law* to receive from Octave Barrois the purchase price of a patent . . . ."	"Appellees, however, argue that the 1880 Act does not require that the money be paid only to the State Treasurer. We feel that this statute is clear on its face."	"We know of no instance in which the State Treasurer receives monies from private individuals. The State Treasurer is a constitutional officer who receives funds from appropriate state agencies — not individuals. . . . [T]he old requirement for payment directly by purchaser to treasurer [had been removed]."
	See 2, *supra*, and 5, *infra*.	See 2, *supra*.	"Since the Register was authorized to *sell*, a corollary is that he was authorized to receive payment. The earliest statutory precept that payment by a purchaser directly to the Treasurer was not retained in the 1871 Act and was therefore not law when the General Assembly had Act 75 of 1880 under consideration."

*District Court, the Court of Appeals and to the *amicus* brief of the State of Louisiana, reprinted as appendices B, C and harge of the District Court, which is reproduced in the appendix on appeal and cited herein as "App. on Appeal."

Issue	District Court	Court of Appeals	Amicus Brief of State of Louisiana	District Court	Court of
4. Was the Register the agent of the patentee so that the failure of the Register to pay the State Treasurer is chargeable to the patentee?	**NO.** App. on Appeal, pp. 610-611; App. B, p. 33a.	**YES.** App. C, p. 73a.	**NO.** App. I, p. 118a.	"It is the law of Louisiana that if a prospective purchaser of public lands pays the price fixed by statute and in the manner fixed by statute to an officer authorized to receive the purchase price, it is of no legal consequence to the purchaser should that officer misappropriate the funds. *Any such misappropriation is the misfortune of the state and not that of an innocent purchaser from the state.* "If you find that Register Lanier failed to deposit the money he had collected . . ., and if you find that no Treasurer's receipt was issued to Barrois, these formalities or the absence of them could not affect the validity of those patents insofar as the Buras heirs are concerned if you find that the Governor signed them." (App. on Appeal, pp. 610-611). (Emphasis supplied.) "In the instant case, the Register did not record the 1898 patents. This was a duty statutorily imposed on him, not on Barrois, the patentee . . . . The register was the proper officer to record these patents and there is no reason to impose his failure to perform his statutory duty on Barrois, especially so, in view of the fact that Barrois did record the patents, where he could do so, in the parish where the lands were located." (App. B, p. 33a)	"To hold that in the statute, the fect, was able to scrupulous Regist the State rather the purchaser, hi feel, undermine significantly frust effects of the Act

Court of Appeals	Amicus Brief of State of Louisiana
"To hold that in failing to follow the statute, the purchaser, in effect, was able to designate the unscrupulous Register as an agent of the State rather than an agent of the purchaser, himself, would, we feel, undermine the purpose and significantly frustrate the salutory effects of the Act involved."	"It is equally clear that if state funds are mishandled internally, it is not the innocent citizen who should suffer. For instance, if the Collector of Revenue should not pay to the State Treasurer a certain assessment collected by him, is it conceivable that the State could proceed with collection of same assessment again? The State of Louisiana will not deal with its citizens thusly and feels compelled to disavow any such actions by its officials in a by-gone era."

Issue	District Court	Court of Appeals	Am Br Sta Lou
Were the Register's acts as "agent" binding against innocent transferees from the patentee so as to invalidate the patent?	**NO.** App. B, p. 33a. App. on Appeal, p. 610.	**YES.** App. C, p. 73a.	**NO.** App. p. 11
Did the failure of the Register to maintain an account of the sale of the lands operate to nullify the 1898 State patents issued in connection with it?	**NO.** App. B, p. 33a, 45a. See App. on Appeal, pp. 611, 613.	**YES.** App. C, pp. 68a-72a.	**NO.** Appen p. 121

Court of Appeals	Amicus Brief of State of Louisiana	District Court	Court of Appeals	Amicus Brief of State of Louisiana
ES. pp. C, 73a.	NO. App. I, p. 118a.	"In the instant case, the Register did not record the 1898 patents. This was a duty statutorily imposed on him, not on Barrois, the patentee . . . . The Register was the proper officer to record these patents and there is no reason to impose his failure to perform his statutory duty on Barrois, especially so, in view of the fact that Barrois did record the patents, where he could do so, in the parish where the land was located." (App. B, p. 33a) "If you find that Register Lanier failed to deposit the money he had collected . . ., and if you find that no Treasurer's receipt was issued to Barrois, these formalities or the absence of them could not affect the validity of those patents insofar as the Buras heirs are concerned if you find the Governor signed them." (App. on Appeal, p. 610)	The Court of Appeals held the patents invalid, thus allowing Pierre Leon Buras and his heirs no benefit arising out of their status as an innocent transferee for value and an innocent transferee's heirs. See 4, *supra*.	Since it is the position of the State of Louisiana that the Register did not act as agent for the patentee, *a fortiori* the Register did not act as an "agent" that would bind the transferee from the patentee.
ES. pp. C, p. 68a- 2a.	NO. Appendix I, p. 121a.	"The Register was the proper officer to record these patents and there is no reason to impose his failure to perform his statutory duty on Barrois, especially so in view of the fact that Barrois did record the patents, where he could do so, in the parish where the land was located." (App. B, p. 33a) "Under the law of Louisiana, if a patent has been duly issued and signed by the Governor it is not rendered invalid merely because it is not recorded in the State Land Office." (Appendix on Appeal, p. 613)	"In no case is the Register to make any entry of the sale of such lands *until the receipt of the Treasurer had been submitted and filed in his office.*" * * * "We adopt a similar approach in holding that the grantee, Barrois, never was invested with title due to his failure to comply with the governing Act in force at that time." (Emphasis in original.)	"(1) the person making the attack must have had an equitable title or an inceptive right upon the land, anteceding the issuance of the patent attacked; (2) and the attack must be aimed at the jurisdiction or legal authority of the officers of the land department. The United States and its mineral lessee could not qualify under either prerequisite and, yet, they succeeded in trying."

Issue	District Court	Court of Appeals	Amicus Brief of State of Louisiana	District Court	Court of Appeals	A
				See 5, *supra*. "The patents were recorded in the parish where the lands are located and the failure of the Register properly to record or index the patents in the State Land Office cannot divest title, especially so, where as here, the heirs of an innocent transferee (Pierre Leon Buras) of the patentee (Octave Barrois) are attempting to assert title." (Appendix B, p. 45a)		
7. Under the facts of this case, is it presumed that the Governor signed the 1898 patents, performing a ministerial duty?	**YES.** App. B, p. 47a.	**NO.** App. C, p. 73a-74a.	**YES.** App. I, pp. 117a-118a.	"Since there is no evidence of any wrongdoing on the Governor's part or of any forgery of his signature, there is a presumption that he performed his *ministerial duty* according to law and validly issued the 1898 patents." (Emphasis supplied.)	The Fifth Circuit did not disagree with the formulation, advanced by the district court and taken from the Fifth Circuit case of *Laterre Co., Inc. v. Billiots Shell Island*, 103 F.2d 53 (5th Cir. 1939), that once an entryman or purchaser of public lands has done all that he is required to do, there is a presumption that the Governor has performed his ministerial duty and that the issuance of a patent is a mere ministerial act. However, the Fifth Circuit stated that the rule announced in *Laterre* was not applicable here *solely* because it believed that all that was required of the purchaser, Barrois, had not been done, namely, Barrois did not pay the State Treasurer, *an official who would have refused to accept the money from Barrois and would have sent him to the Register, who by law and custom was designated and authorized as the appropriate official to whom payment was to be made!*	"Since the lary right t Thus, the Register Sr sign it, the withstandir

"Since the Register was authorized to sell, the corollary right to receive the purchase price clearly follows. Thus, the Louisiana Court by *mandamus* required Register Smith to issue a patent and the Governor to sign it, the admitted lack of a treasurer's receipt notwithstanding."

Issue	District Court	Court of Appeals	Amicus Brief of State of Louisiana	Dist
8. Does a subsequent Register retain jurisdiction to issue new patents on the same land without revoking the prior patents or bringing any action to set them aside?	**NO.** App. B, pp. 40a-41a; App. on Appeal, p. 613.	**YES.** App. C, p. 65a.	**NO.** App. I, p. 119a.	"In the instant ca ier's successor, ap the 1898 patents is as valid, since he the subsequent 1903 ever, it is clear tha do so. He could not invalid at his own • "Once the state of L of ownership of the 1898 patents it had n that it could convey any act transfer an erty in 1903, if the (App. B, pp. 40a-41a "If you find that th were signed by the issued, then Register no authority to canc ents." (App. on App

Court of Appeals	Amicus Brief of State of Louisiana	District Court	Court of Appeals	Amicus Brief of State of Louisiana
YES. App. C, p. 66a.	**NO.** App. I, p. 119a.	"In the instant case Register Smith, Lanier's successor, apparently did not regard the 1898 patents issued initially to Barrois as valid, since he initiated the issuance of the subsequent 1903 patents to Barrois. However, it is clear that he had no authority to do so. He could not declare the 1898 patents invalid at his own whim . . . ." * * * "Once the state of Louisiana divested itself of ownership of the disputed lands by the 1898 patents it had no interest in those lands that it could convey in 1903. It could not by any act transfer any interest in that property in 1903, if the 1898 patents are valid." (App. B, pp. 40a-41a) "If you find that the 1898 Barrois patents were signed by the Governor and lawfully issued, then Register Lanier's successor had no authority to cancel or to annul those patents." (App. on Appeal, p. 613)	The answer is implicit in the Fifth Circuit's holding that the new patents were issued in "complete compliance with Louisiana law" and in its recognition of the validity of the 1903 patents.	"Yet this Court has suggested that the 1903 patents are valid on their face. Because the State Land Office had lost all jurisdiction over the subject lands through issuance of the earlier patents, the later patents conveyed no rights whatever."

Issue	District Court	Court of Appeals	Amicus Brief of State of Louisiana	District Court	Court of Appeals	
9. Are the prerequisites in *Albritton v. Shaw* with respect to a junior patentee's right to attack a senior patent swept aside when proof of the existence of the senior patent is made by a certified copy of the original patent rather than by introduction of the original patent into evidence?	Found unnecessary to decide since 1898 senior patents were held valid. However, the district court intimated "NO." App. B., pp. 42a-46a. App. on Appeal, p. 612.	**YES.** App. C, pp. 63a-65a.	**NO.** App. I, p. 121a.	"The Government cannot meet [the *Albritton*] prerequisites as its title emanates from the patents issued in 1903, *subsequent* to the 1898 patents. But it does not attack *Albritton v. Shaw, supra*. Rather, to repeat, it takes the position that the 1898 patents are invalid because no consideration was ever paid to the state. It is argued that these patents being inherently invalid are not protected by the collateral attack rules set out in the above cases. In *Smith v. Crandall, supra*, the question of the legality of patents issued in 1881 was before the court. They were attacked on the ground that the patented lands were illegally purchased for scrip, instead of money, the court held that the 'plaintiffs are without standing to maintain an action to annul such patents' . . . . This case is analogous to the instant one." * * * "[I]t is not clear whether the party attempting to rebut this presumption is required to meet the limitations imposed by *Albritton, supra* and *Smith, supra*. This question is one not answered by Louisiana jurisprudence. It is not necessary, however, for this court to answer that question. . . ." * * * "In *State v. Sweet Lake Land & Oil Co.*, 164 La. 240, 113 So. 833 (1927), the court said: 'It is hardly necessary to consider the defendant's plea that the state had no right to assail collaterally, in a peti-	The Court of Appeal purported to give four reasons to distinguish this case from that of the *Albritton* variety, none of which bears any logical relation to the *reason* for the *Albritton* rule.	The S cuss existe rathe the S ents in co since and *Shaw*, not qu ceede of co state conte

Issue	District Court	Court of Appeals	Amicus Brief of State of Louisiana	District Court
				tory action against an innocen feree holding title from the p the original patents, which are ently valid. There seems to be about the proposition that a la ent, if not void on its face, is no conveyance of the title for the l is in the nature of an official tion by that department of the ment in which the sale of the lands is intrusted by law that a requirements preliminary to th of the patent were complied wi that declaration, or presumption open to rebuttal in an action against an innocent transferee title from the patentee.' (emphas plied) (citations omitted), 113 838." (App. B, pp. 42a-46a) "You are therefore instructed that ments marked Defendants' 1-26 Ex 3e, being certified copies of patent ord in the conveyance office of th of Plaquemines, are to be given t *weight that you would give the ori such documents if they were avail introduced into evidence.*" (Emph plied) (App. on Appeal, p. 612)

Amicus Brief of State of Louisiana

The State of Louisiana, in the *amicus* brief, did not discuss directly the question of the effect of proof of the existence of a patent by introduction of a certified copy rather than by introduction of the original. However, the State of Louisiana was aware that proof of the patents in the *Buras* case was made by certified copies in conformity with the provisions of La. R.S. 13:3726, since it had reviewed the Court of Appeals' decision and nonetheless concluded that, under *Albritton v. Shaw*, "the United States and its mineral lessee could not qualify under either prerequisite and, yet, they succeeded in trying to [qualify]. Their contention of lack of consideration had no merit whatever for only the state in an appropriate action could have raised that contention."

Court of Appeals	Amicus Brief of State of Louisiana	District Court	Court of Appeals	Amicus Brief of State of Louisiana
		tory action against an innocent transferee holding title from the patentee, the original patents, which are apparently valid. There seems to be no doubt about the proposition that a land patent, if not void on its face, is not only a conveyance of the title for the land, but is in the nature of an official declaration by that department of the Government in which the sale of the public lands is intrusted by law that all of the requirements preliminary to the issue of the patent were complied with, and that declaration, or presumption, is not open to rebuttal in an action at law against an innocent transferee of the title from the patentee.' (emphasis supplied) (citations omitted), 113 So. at 838." (App. B, pp. 42a-46a) "You are therefore instructed that the documents marked Defendants' 1-26 Exhibits 3a-3e, being certified copies of patents of record in the conveyance office of the Parish of Plaquemines, are to be given the *same weight that you would give the originals of such documents if they were available and introduced into evidence.*" (Emphasis supplied) (App. on Appeal, p. 612)		

Issue	District Court	Court of Appeals	Amicus Brief of State of Louisiana	District Court	Court of Appeals	
10. Does the after-acquired title doctrine apply to a deed containing a stipulation against its warranty if the buyer had no knowledge of danger of eviction and is an innocent, bona fide purchaser?	**YES.** App. on Appeal, pp. 613-614.	**NO.** App. C, pp. 75a-76a.	**YES.** (as to a similar question) App. I, p. 122a.	The district court's opinion stated that the after-acquired title issue became moot in view of its finding that the senior 1898 patents were valid, but the court's charge, quoted below, reflects, and all agree, that it was the court's view that the doctrine was applicable: "There are circumstances in the law when a title which is later acquired by a seller can inure to the benefit of a party to whom he previously sold it before he acquired the valid title. This is termed in the law the after-acquired title doctrine. This principle that an after-acquired title inures to the benefit of a prior purchaser does not apply to every deed, however, as will hereinafter be explained. "A deed which expressly excludes warranty will not give to the purchaser the benefit of a title which is later acquired by the seller if at the time of the execution of the original deed the purchaser was aware of a danger of eviction from the property; that is to say, that he had knowledge of facts which indicated a possible defect in the title which he was acquiring." * * * "The mere presence of a non-warranty clause in a deed does not necessarily constitute proof that a purchaser has knowledge at the time of his purchase of the danger of wrongdoing."	The Fifth Circuit relied *solely* on general dicta in *Butler v. Bazemore*, notwithstanding controlling dicta in the Louisiana Supreme Court decision in *Waterman v. Tidewater Associated Oil Co.*, 213 La. 588, 35 So.2d 225, 233 (1947) to the contrary, as well as more specific dicta in *Bazemore*, itself, that would compel application of the after-acquired title doctrine, and notwithstanding the unanimous contrary view of all Louisiana commentators on the issue. The Fifth Circuit held: "Once a vendee agreed to accept a no warranty deed, he accepts the risks that go with it. We feel the clear implication of Bazemore v. Butler [sic] is that after-acquired title does not apply when warranty is expressly excluded."	"The 1898 were the i vesti Pierr non-w appli idity

"The only earlier application was the one on whi
1898 patents were issued. Hence, if the 1903 p
were valid at all, they would be valid retroactiv
the initial application. This would carry with
vesting of title in the assignee of the entryma
Pierre Leon Buras. Neither principles of war
non-warranty, or quit-claim deeds should affe
application of the rule relating to the retroactiv
idity of a state land patent."

Issue	District Court	Court of Appeals	Amicus Brief of State of Louisiana	District Court
11. May a third party or even the State attack the validity of a patent on the basis of want of payment to the State if the patent is apparently valid and the lands have been sold to an innocent transferee?	District Court found it unnecessary to decide, but intimated "**NO.**" App. B, pp. 42a-46a.	**YES.** App. C, p. 65a.	**NO.** App. I, pp. 119a-120a.	See 9, *supra*.
12. Must a certified copy of a patent certified in conformity with La. R.S. 13:3726 be given "the same credit as the original thereof," as the statute so states?	**YES.** (However, the court did not decide whether *Albritton* doctrine applied to patents proved in conformity with La. R.S. 13: 3726) App. B, pp. 43a-44a. App. on Appeal, p. 612.	**NO.** App. C, pp. 63a-65a.	**YES.** App. I, p. 121a.	"This statute specifically provi *alia*, that where a patent for land recorded in the office of the parish where the land is situated, a cop record properly certified by the p entitled to the same credit as the (App. B, pp. 43a-44a) "You are therefore instructed that ments marked Defendants' 1-26 Ex 3e, being certified copies of paten ords in the conveyance office of th of Plaquemines, are to be given *weight that you would give the ori such documents if they were avail introduced into evidence.*" (Emph plied). (App. on Appeal, p. 612)

District Court	Court of Appeals	Amicus Brief of State of Louisiana	District Court	Court of Appeals	Amicus Brief of State of Louisiana
District Court found it unnecessary to decide, but intimated "NO." App. B, pp. 42a-46a.	**YES.** App. C, p. 65a.	**NO.** App. I, pp. 119a-120a.	See 9, *supra*.	"Having determined that the validity of the 1898 patents is fair game for the Government, we consider whether they stand or fall on their own merits."	"It was more precisely held in *State v. Sweet Lake Land and Oil Co.*, 164 La. 240, 113 So. 833 (1927), that: '. . . a land patent, if not void on its face, is not only a conveyance of the title for the land, but is in the nature of an official declaration by the department of the government to which the sale of the public lands is entrusted by law that all of the requirements preliminary to the issue of the patents were complied with, and that declaration, or presumption is not open to rebuttal in an action at law against an innocent transferee of the title from the patentee.'" • • • "It is also important, of course, that such presumption prevents an attack on the patent, except in the two instances to be mentioned below."
YES. (However, the court did not decide whether *Albritton* doctrine applied to patents proved in conformity with La. R.S. 13: 3726) App. B, pp. 43a-44a. App. on Appeal, p. 612.	**NO.** App. C, pp. 63a-65a.	**YES.** App. I, p. 121a.	"This statute specifically provides, *inter alia*, that where a patent for land has been recorded in the office of the parish recorder where the land is situated, a copy of such record properly certified by the parish and entitled to the same credit as the original." (App. B, pp. 43a-44a) "You are therefore instructed that the documents marked Defendants' 1-26 Exhibits 3a-3e, being certified copies of patents of records in the conveyance office of the Parish of Plaquemines, are to be given the *same weight that you would give the originals of such documents if they were available and introduced into evidence.*" (Emphasis supplied). (App. on Appeal, p. 612)	See 9, *supra*.	See 9, *supra*.